5. Whether, on the established facts, the exclusion of all evidence of special adaptability and use was contrary to the spirit, or the express provisions, of the Treaty of 1925 between the United States and Great Britain in respect of Canada, and Acts of Congress giving effect thereto.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution of the United States.

2. Article I, Section 13, Constitution of the State of Minnesota (Appendix D).

TREATIES INVOLVED

1. Treaty of 1909 between the United States and Great Britain in respect of Canada, 36 Stat. Part II, Page 2448. (The pertinent parts of said Treaty are in Appendix A.)

2. Treaty of 1925 between the United States and Great Britain in respect of Canada, 44 Stat. Part III, page 2108. (The pertinent parts of said Treaty are in Appendix B.)

STATUTES INVOLVED

Act of May 22, 1926, 44 Stat. Part II, page 617, Amended, April 18, 1928, 45 Stat. Part I, Page 431.

(The pertinent parts of the Statute as amended are in Appendix C.)

STATEMENT OF THE CASE

1. Condensed Statement

Petitioners' lands form a part of the shore line of the Lake of the Woods. They are peculiarly adapted for use, with other lands, as a reservoir for the storage of water in the development of electric power. For more than thirty years, these lands have been used, intermittently, to form the Lake of the Woods storage reservoir. This reservoir was created by the erection of the Norman Dam at the outlet of the Lake of the Woods in Canada. The dam was completed in 1898 by the Keewatin Power Company, for the development of hydro-electric power. It raised the water in the lake about three feet above natural level. Petitioners' lands, together with others, were flooded without right, and no compensation was paid.

The United States, pursuant to Treaty of 1925 with Great Britain in respect of Canada, is acquiring by condemnation a perpetual flowage easement on these shore lands. Petitioners claims were selected by agreement as test cases to determine the measure of compensation or damage to be paid. Petitioners offered evidence tending to prove: that their lands were especially adapted for use as a storage reservoir; that they actually had been so used intermittently for thirty years; that they were so used at the

time of condemnation; that the power companies benefited, and to be benefited, by said use were well established going concerns; that there was conflict and competition between said power interests for the rights to said reservoir; that higher prices were actually paid for said lands because of their use and adaptability for power purposes.

The District Court excluded all such evidence and offers of proof, and instructed the jury that the adaptability and actual use of Petitioners' lands for storage purposes could not be considered in determining their market value, but that their market value must be determined solely from their use and adaptability for agricultural purposes, notwithstanding the fact that said lands have never been used for agricultural purposes, and are not adapted for agriculture.

2. Detailed Statement with Record References

The Lake of the Woods is international boundary water between Minnesota and Canada. It has an area of about 1,500 square miles, and a main shore line in Minnesota of about 140 miles (R. 427). The outlet of the lake by the Winnipeg River is in Canada. There are valuable natural water-power sites along that river. To fully develop them it is necessary to use the Lake of the Woods as a storage reservoir, thereby raising the level of the lake about three

feet, with resultant flooding of its shore lands (R. 417)..

The Minnesota shore lands so flooded total several thousand acres. The titles are variously held by several hundred private parties, municipalities, the State of Minnesota, and the United States. Canadian shore lands are similarly owned (R. 427).

The storage reservoir was created and its value demonstrated by the Norman Dam, built for hydro-electric power purposes by the Keewatin Power Company, a Canadian corporation, at Kenora, Ontario, in 1898. The reservoir has been maintained and used intermittently since that date (R. 22-24). It has increased the power capacity of the Canadian hydro-electric plants in the Winnipeg River by about fifty per cent or approximately 200,000 continuous horsepower (R. 35, 50). This increased power is worth more than a million dollars in profits annually (R. 56).

In 1909 a Treaty was enacted between the United States and Great Britain, in respect of Canada:

> "to prevent disputes regarding the use of boundary water and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other, or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such

questions as may hereafter arise." (Preamble to Treaty of 1909, Appendix A).

The owners of the flooded lands employed counsel to obtain a discontinuance of the trespass on their lands, or the payment of just compensation therefor (R. 62, 74). During the early years they were represented by Hon. Halvor Steenerson, who became a member of Congress from Minnesota. Later they were represented by Hon. Charles Loring, now a Justice of the Supreme Court of the State of Minnesota, and still later by Hon. G. A. Youngquist, one time Assistant United States Attorney General (R. 62).

In 1912, questions arising out of interference with lake levels and the flooding of shore lands were referred to the International Joint Commission. Extensive studies were made, public hearings were held, and a report, with recommendations, was published and filed by the International Joint Commission in 1917 (Final Report of International Joint Commission).

In 1925 a Treaty was consummated between the United States and Great Britain, in respect of Canada, embodying the International Joint Commission's recommendations that a flowage easement on Minnesota shore lands be acquired. (Appendix B).

Said Treaty was put into effect by Act of Congress May 22nd, 1926, amended, April 18, 1928 (Appendix C).

The proceedings involved herein were brought by the Secretary of War, pursuant to said Acts. Commissioners, regularly appointed, assessed the compensation. The government and said land owners appealed from the Commissioners' awards.

At the trial on said appeals, the principal question was whether the use for reservoir purposes which was then being made of Petitioners' lands, and which had been made of them for the past thirty years; and whether circumstances which made said lands especially adptable for such special use; and whether the fact that said actual use and special adaptability had actually increased the market value of said lands continuously since 1915, should be received in evidence, and considered in determining just compensation (R. 24-33, 130, 302-309).

The court excluded all evidence tending to prove any and all of such facts, and instructed the jury not to consider the use which the lands had served, and were serving at the time of condemnation, but to consider only the value of the lands for agriculture, although it was admitted that the lands were not suitable for agriculture and had never been used for that purpose. (R. 24-33, 130, 302-309).

This method of presenting the question of law for review on appeal was adopted by the District Court, on motion of the Special Assistant United States Attorney, that the land owners be required to file written offers of proof. The Government's-mo-

tion was granted, and Petitioners offered to prove the following facts, by competent witnesses (R. 27-124):

By **Mr. Adolph F. Meyer,** Chief Consulting Engineer for the American Section of the International Joint Commission (R. 22-23, 27, 33-40), **Mr. Gardner S. Williams,** an internationally known hydro-electric engineer of outstanding ability and experience (R. 45-49), **Mr. George C. Newton,** hydro-electric engineer with experience not only as an engineer but in the acquisition and development of reservoirs for storage purposes (R. 75); and by many other witnesses, bankers, real estate dealers, and residents (R. 57-104), that their lands have been used for storage in the development of hydro-electric power for thirty years; that there are valuable water-power sites at the outlet of the Lake and in the Winnipeg River; that these water-power sites cannot be fully developed without creating a storage reservoir in the Lake of the Woods, and that such reservoir cannot be maintained without flooding Petitioners' lands (R. 27-28, 33-35, 57-105).

Petitioners further offered to prove that the power industries which have been using their lands for storage purposes are well established and financially responsible; that additional storage for the development of hydro-electric power will be required; that there is a demand for electric power in the Winnipeg River area, and that it is reasonably certain that such demand will increase; that Peti-

tioners' lands are not being condemned for an undeveloped and speculative project, but for an established going industry (R. 23-28, 34-35, 50, 116-122).

That the storage reservoir, of which Petitioners' lands form a part, increases the potential electrical capacity of these power industries by about 50%, or by approximately 200,000 continuous horsepower; that this increase in constant power capacity is worth upwards of a million dollars annually in increased net profit to said power companies (R. 35, 50, 51, 56).

Petitioners offered to prove that there was competition between two groups of power interests for the right to develop and control the storage reservoir; that the value of the right to control the reservoir was so great that one or the other of said power groups would have acquired the necessary flowage rights if the United States Government had not undertaken to do so; that the requirements of good business would have necessitated the acquisition of said flowage rights, and that it was entirely practicable for private enterprise to acquire the same either by or without resorting to eminent domain (R. 35-40, 51-53, 78-80).

Petitioners offered to prove that much publicity was given to the importance of the Lake of the Woods as a storage reservoir, and the great value of its shore lands for that purpose. Copies of arguments and briefs, presented at public hearings, and editor-

ials, with wide circulation, were offered, accompanied by offers to prove that such publicity affected the market value of these lands, because it created public interest in and a demand for Lake of the Woods shore lands (R. 65-66, 71, 73, 74, 85, 90, 101, 102, 116-124, 299-301, 329).

That because of the foregoing facts the market value of these lands at the time of condemnation, and during the entire period of 15 years prior thereto, was affected, and higher prices were paid therefor (R. 38, 57-60, 62, 64-69, 71-74, 84, 85, 94, 97, 100, 310).

Petitioners then offered to prove the fair market value of their land before and after the imposition of the flowage easement, taking into consideration all the facts and circumstances in any way shown by the evidence to have affected market prices (R. 95-98, 102, 103).

Petitioners also offered to prove that in the State of Minnesota flowage easements are recognized and dealt in as separate units of property, distinct from the fee, and offered to prove the fair market value of the flowage easements on Petitioners' lands as such distinct units of property (R. 40-43, 55, 82, 87). That flowage rights and easements have been recognized and reserved in instruments of conveyance (R. 105-106).

The District Court excluded all of Petitioners' evidence and offers to prove, adopting the view of

Government counsel that the special adaptability of Petitioners' land for reservoir purposes, and the fact that their lands were then used, and long had been used, for that purpose, could not, as a matter of law, be considered in determining their market value, conceding Petitioners' offers of proof to be true. The effect of the trial court's ruling was the same as if a demurrer to Petitioners' evidence had been sustained (R. 24, par. 32; R. 27, par. 3).

The question for determination by this Court is specific and clear cut. **The question is, assuming the facts contained in Petitioners' offers of proof to be true, may such facts be taken into consideration in determining the market value of Petitioners' lands?**

Circuit Judge Booth in his dissenting opinion very clearly stated the question presented on the record in the following language:

> "There is no point raised as to the sufficiency of the offers to prove; and the charge of the Court was explicit. It read:
>
> " 'In computing the fair market value, both before and after the imposition of the easement, you will take into consideration all of the uses for which the property was available on May 4th, 1929, and May 5th, 1929, and determine what use it was most valuable for, and base your award thereon; but you will not make an award based on any claim for reservoir value. I have held that under the law the value of these lands

could not be based upon the use of the lake and its shores for reservoir purposes. It is, as I understand it, conceded that the only other use for which these lands are suited, with the exception perhaps of Mr. Olson's tract, is for agricultural purposes, or purposes relating to agriculture, so that it is for those purposes that you are to value these lands.'

"The offers to prove, the rulings thereon, and the charge of the Court were all made pursuant to an agreement by Court and counsel that the crucial question should be raised and embodied in the record by offers to prove and by charge of the Court, as the clearest and most concise way of presenting the question to the Appellate Court." (R. 437.)

SPECIFICATIONS OF ERROR

The Circuit Court of Appeals erred:

1. In holding that the actual use of Petitioners' lands for reservoir purposes could not be considered in determining market value (R. 426, 427).

2. In holding that the Treaty of 1909 between the United States and Great Britain, in respect of Canada, did not give Petitioners redress for the unlawful flooding of their lands (R. 426, 427).

3. In holding that Petitioners had no remedy

for the wrongful flooding of their lands (R. 426, 427).

4. In holding that the potential use and special adaptability of Petitioners' lands were too remote and speculative to influence market value (R. 426, 427).

5. In holding that the exercise of eminent domain, in acquiring the flowage easement, necessarily excludes special adaptability for a useful purpose from consideration in determining market value (R. 426, 428).

6. In affirming the judgments of the District Court (R. 426-429).

SUMMARY OF ARGUMENT

Petitioners' lands are specially adapted for use in forming a storage reservoir for the development of hydro-electric power, and they have been used for that purpose since 1898.

Because of this special adaptability and actual use higher prices have been paid for these and similar lands than they were worth on the market for agricultural purposes. It is not disputed in the record that this adaptability and actual use, in fact, increased market prices for a continuous period of thirteen years, from 1916 to the date of condemnation.

Because of their actual use for reservoir purposes, these lands have never been adapted to agriculture, and have never been used for that purpose. Notwithstanding that fact the trial court excluded all evidence of special adaptability and actual use, and instructed the jury to disregard the adaptability and use of these lands for reservoir purposes, and base its verdict, solely, on their adaptability and use for agricultural purposes.

CLAIMS OF THE PARTIES

(a) The Government claimed that multiplicity of ownerships and other deterent factors operate, as a matter of law, to exclude special adaptability and actual use from consideration in determining market value, conceding that such adaptability and use have actually increased market prices.

(b) Petitioners, recognizing that the factors urged by the Government might depress market values, claimed that because the record proves that market values were, in fact, actually increased by the special adaptability and use of these lands, such adaptability and use must be considered in estimating market value; that the favorable as well as the unfavorable factors must be considered.

The question of law and the undisputed facts in the record were clearly stated in the dissenting opinion.

Judge Booth said:

"It should be kept clearly in mind that the testimony sought to be introduced in the cases at bar, but excluded, was not offered for the purpose of obtaining damages for past trespass, but solely for the purpose of establishing an existing and established element of value of the land, to be considered by the jury . . . and, further, that the testimony sought to be introduced, but excluded, was not offered for the purpose of establishing a value of the flowage use which had come into existence by reason of the commencement of the condemnation proceedings. The testimony was proffered for the purpose of establishing the value of a flowage use which had existed for many years and which value was claimed to be an important element in the total value of the particular land taken.

". . . the landowners offered to prove that shore lands similar to those involved had been purchased long prior to the present condemnation proceedings because of their use for storage or reservoir purposes; and that larger prices were paid for such lands for that reason; that the conditions affecting the Lake of the Woods, and existent before the condemnation proceedings were commenced, were such as would naturally affect the market value and market price of shore lands; that the market value and market price of shore lands similar to those involved were in fact affected by their adaptability for

use, coupled with actual use for flowage or reservoir purposes; that it was reasonably certain that the interests controlling the power projects below the outlet of the lake would seek to acquire flowage rights had not the treaty of 1925 been made; that there was competition between Ontario interests and Winnipeg interests in regard to the acquirement and control of the Lake of the Woods reservoir; that such flowage rights had a well-recognized rental value; and the amount of such rental value.

* * * * *

"The Government contended, among other things, that before flowage or reservoir use of said shore lands could be an element of value of said lands, there would have to be a unification of the many titles to the shore lands and a control of the waters of said lake.

"It seems to me that the question is one of fact whether the adaptability for reservoir or flowage purposes coupled with the long-continued actual use for such purpose entered into the value of such lands or not. Whether such element of value would have been greater if the titles to the various parcels had been unified is not material; nor is it material whether or not there **should have been logically** no element of value in the lands based upon adaptability and use for reservoir purposes until the titles were

unified. Unification of the titles may have been somewhat impracticable, but co-operation between the various owners including the United States and Canada (even by acquiescence) as to maintenance of lake levels was not impossible, but an established fact, even though the exact extent of the co-operation was not definitely fixed.

"The question whether the adaptability, coupled with the actual use, did in fact enter into the value of the lands was, in my opinion, for the jury, and the question should have been submitted under proper instructions." (Boldface is italicized in record). (R. 435-437).

The record presents a clear-cut question: Assuming the facts offered to be proved by Petitioners to be true, must the special adaptability and actual use of the land for reservoir purposes be excluded from consideration; and must the jury base its verdict on assumed adaptability and use for agriculture, when it is proved, as a fact, that adaptability and use for agriculture have never existed in fact, and never can exist, because of the prior use and the perpetual easement for storage purposes?

1. **The general rule** is that what the property is worth in the market viewed with reference to all uses to which it is plainly adapted is the measure of just compensation.

2. **Reasons advanced in majority opinion for not applying the general rule** are, that **the actual use** of Petitioners' lands for storage must be disregarded because it was of no value to Petitioners, since they had no right of redress against the unlawful use. The adaptability of said lands for **potential use** must be disregarded because it was too remote and speculative to influence market values; and because unification and use would be impracticable except by the exercise of eminent domain; and where the power of eminent domain is exercised, special adaptability must be left out of consideration.

3. Analysis of the reasons advanced discloses that the facts assumed in the majority opinion are disproved by the record, because:

a. Market values were **in fact** increased because of the special adaptability and use;

b. The increase in market prices existed before and entirely independently of the condemnation;

c. There was potential competition and demand for said lands, and it was entirely practicable for the power companies competing for said lands to have acquired the flowage rights and developed the storage reservoir by private enterprise, without eminent domain.

d. Said reservoir was used, and the unification of said lands was an accomplished fact for thirty years.

e. Whether Petitioners were able to recover compensation for the use of their lands, in the past, is not controlling, since the record proves that higher prices were paid for these lands because of their special adaptability and use.

4. The Treaty of 1909 conferred upon Petitioners rights of redress on account of the unlawful use of their lands; and even without the Treaty of 1909 Petitioners had such rights under general law.

7 R. C. L. § 99, p. 1062

Note 42 A. L. R. 196, 210

15 C. J. Page 744, § 44

Rickey Land & Cattle Co. v. Miller & Lux
(C. C. A. 9th Cir.)
152 Fed. 11, 16

Stillman v. White Rock Mfg. Co.
23 Fed. Cases No. 13466
3 Woodf. & M. 539

Mannville Co. v. City of Worchester
138 Mass. 89
52 Am. Rep. 261

Bulwer's case
4 Coke (part 7) 49
77 Eng. Reprint 411

Scott v. Brest
2 T. R. (Eng.) 238

Whether these titles are unified by the exercise of eminent domain is immaterial, because the record proves that these lands, due to their inherent adaptability for storage purposes, and their actual use for that purpose, possessed a higher market value.

New York v. Sage
239 U. S. 57

McGovern v. New York
229 U. S. 363

U. S. v. Chandler-Dunbar Water Power Co.
229 U. S. 52

Simpson v. Shepard (Minnesota Rate cases)
230 U. S. 352, 451

Shoemaker v. United States
147 U. S. 282

Monongahela Navigation Co. v. U. S.
148 U. S. 312

5. The general principles deducible from the decisions of this court, and other cases, are, that market value must be determined by considering all facts and circumstances which are shown to have affected such value; that inherent adaptability for a special purpose, which is actually in use at the time of condemnation, and which is shown to have had an ef-

fect, in fact, upon market prices of similar lands, must be taken into consideration in determining just compensation.

Brooks-Scanlon Corp. v. U. S.
265 U. S. 106, 123, 125, 126

Ford Hydro-Electric Company v. Neely
13 Fed. (2d) 361

Conan v. City of Ely
91 Minn. 127
97 N. W. 737

Weiser Valley Land & Water Co. v. Ryan
(C. C. A. 9th Cir.)
190 Fed. 417, 423

Niagara Lockport & Ontario Power Co. v. Horton
231 App. Div. 402
247 N. Y. S. 761

Gearhart v. Clear Spring Water Co.
202 Pa. St. 292
51 Atl. 891

Emmons v. Utilities Power Co.
82 N. H. 181
141 Atl. 65

Alloway v. Nashville
88 Tenn. 512
13 S. W. 123

Sargent v. Merrimac
196 Mass. 171
81 N. E. 970
11 L. R. A. (N. S.) 996

Edwards v. City of Cheyenne
19 Wyo. 110
114 P. 677

6. The record having established without contradiction, both the adaptability and the actual use of Petitioners' lands for a special purpose, and that such adaptability and use actually increased market prices for a period of many years before the condemnation, it follows logically and necessarily that such special adaptability and actual use must be taken into consideration in determining just compensation.

7. The value of the flowage easement being acquired, considered as a separate unit of property, giving due consideration to its use and adaptability, and the difficulties involved in its acquirement and utilization, is the measure of just compensation; because flowage easements are dealt in as distinct units of property, and all of Petitioners' usable flowage right is being acquired in these proceedings.

8. The Treaty of 1925, and the Acts of Congress giving it effect, contemplate that the special adaptability and actual use of Petitioners' lands shall be considered in determining just compensation.

From the foregoing considerations, it is concluded that the judgments which excluded from consideration facts upon which alone the market value of these lands has been based for many years; and which required the jury's verdict to be based solely upon assumed adaptability and use for agriculture, although the lands never have been, and never can be, used for that purpose, should be set aside, and new trials granted.

ARGUMENT AND AUTHORITIES

I. GENERAL RULE ON MEASURE OF JUST COMPENSATION IN EMINENT DOMAIN.

"In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what it is worth from its adaptability for valuable uses."‡

Mississippi & Rum River Boom Co. v. Patterson
98 U. S. 403, 407-408
Conan v. City of Ely
91 Minn. 127
97 N. W. 737

‡Boldface supplied at the direction of counsel, wherever it appears, unless otherwise indicated.

II. REASONS ADVANCED IN MAJORITY OPINION OF THE CIRCUIT COURT OF APPEALS FOR NOT APPLYING THE GENERAL RULE TO THE FACTS IN THIS RECORD.

The principal reasons advanced in the majority opinion for not applying the general rule are:

(A) ACTUAL USE—REASONS FOR EXCLUDING

1. In Fact

The actual use being a trespass "was a positive reducer of value" (R. 426), and "there was no demand for this use by anyone who would or could be made to compensate him therefor" (R. 427).

2. In Law

Since the "actual use" was by foreign trespassers the property owners had no "hope of redress" (R. 426).

(B) POTENTIAL USE—SPECIAL ADAPTABILITY FOR—REASONS FOR EXCLUDING

1. In Fact

The multiplicity of titles and ownerships, and the difficulty of unification were such that the possibility of accomplishment did not hold "that degree of probability or possibility **which could affect the**

value of these lands." Before the Convention of 1925 "such a tract of land would be worth only its use for agricultural or fishing purposes, with the burden of the flowage actually thereon. . . ." Beyond the compensation granted by the treaty "there is no vestige of reason for an increase in the sales price of these lands. . . ." "Even if owners and buyers might actually have thought this compensation (provided in the Treaty of 1925)* would include an enhancement from use for flowage purposes there was no justification in law for such view. Such thought could spring only from the Convention which had in mind this very improvement and values arising because of the particular improvement cannot be included in compensation." (R. ft. 427, 428).

2. In Law

"Also this Convention clearly provided for accomplishment of acquisition through eminent domain, and where the use is possible only through the exercise of that power 'it must be left out' (McGovern v. New York, 229 U. S. 363, 372) in estimating the probability of such a use as affecting sales value and compensation." (R. ft. 428.)

III. DISCUSSION OF REASONS ADVANCED IN MAJORITY OPINION

(A) ACTUAL USE

1. Examination of Assumed Facts

As a reason for excluding the actual use which

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*Parenthesis supplied by counsel.

was made of Petitioners' lands, the majority of the Circuit Court of Appeals assumed certain facts to be true, which if not true would overthrow the Court's decision.

The majority opinion assumes, as a fact, that the "actual use" which was made of Petitioners' lands "was a positive reducer of value," and that "there was no demand for this use by anyone who would or could be made to compensate him therefor."

The uncontradicted facts in the record prove that these assumptions of fact are unfounded.

The actual use of Petitioners' lands for reservoir purposes might benefit the owners in any one of three ways, or in a combination thereof:

(A) The owners might benefit by personally participating in the actual use;

(B) By collecting damage or rental for the actual use;

(C) By an increase in the market price caused by the actual use.

The majority opinion assumes, erroneously we believe, that Petitioners were powerless to collect damage or rental for the unlawful use of their lands, and, for that reason, that such use could not be of any value to them. In this conclusion we believe the

majority opinion is clearly in error, because it completely ignores the undisputed increase in the market value of these lands.

It is not, and cannot be, disputed that for many years the market value of these submerged lands was substantially increased because of their actual use and adaptability for reservoir purposes. That fact is attested to by numerous witnesses (R. 27-124). **Petitioners at all times before the taking could have obtained a higher price for their lands because of this special use and adaptability.**

Whether Petitioners could collect damage or rental for the trespass is not the sole test of the value to them of the special use being made of their lands, as assumed in the majority opinion. What would their lands bring when sold on the market? That was the true test of the value of their lands to them. **The fact that actual use for storage increased the market value of these lands is of greater significance in determining market value than is the possibility of collecting damage for the trespass. The owners held their lands for sale, to be used in accomplishing the lawful purposes for which they were plainly adapted. They did not hold their lands primarily for the purpose of collecting damage for their unlawful use.**

Increase in market value is as truly a benefit to Petitioners as would be the right to collect compensation for the use of their land. And since market

value is the subject of inquiry, any fact or circumstance which has affected it must be considered even under the majority hypothesis.

The majority opinion further assumes as a fact that "there was no demand for this use by anyone who would or could be made to compensate him (the owner) therefor, and that accordingly the use must be disregarded.

Obviously this reasoning is likewise unsound, for since the owners were able to obtain a higher selling price for **their lands** because they were used for storage purposes, it cannot be said that such use was of no value to them, regardless of what demand there may or may not have been for the **use itself. It was the LAND which Petitioners held for sale and not the USE. It is the increased market value of THEIR LAND, and not the market for the USE which benefited the owners. It is not disputed in the record that the LANDS did sell for a higher price notwithstanding that the USE then being made of them was illegal.**

But the record disproves the majority assumption that "there was no demand for this use by anyone who would or could be made to compensate him therefor." The record proves without contradiction, that there was a conflict of interest between the power concerns operating in Ontario and those operating in Manitoba, and that the value of the reservoir was so great, and the competition and conflict

between the power interests so fundamental that the one group or the other of these power interests would have acquired the flowage rights (R. 22-75).

The true situation disclosed by the record is clearly stated by Judge Booth in his dissenting opinion, as follows:

> "The land owners offered to prove . . . that it was reasonably certain that the interests controlling the power projects below the outlet of the lake would seek to acquire flowage rights had not the treaty of 1925 been made; that there was competition between Ontario interests and Winnipeg interests in regard to the acquirement and control of the Lake of the Woods reservoir;" (R. 436).

The majority decision is based upon the further assumption that:

> "It was not until the Convention of 1925 that there was any possibility of the landowner receiving **any** compensation for this taking of his land. Nor has there been before or since any possibility of any other demand for such use." (R. 427).

The record proves the exact opposite of the foregoing assumption.

It is undisputed that similar lands were actually bought and sold on the market for higher prices because of their actual use for reservoir purposes, **even**

before the report of the International Joint Commission was published in 1917.

As early as 1916 Mr. William Rulien, a real estate dealer, purchased 160 acres, practically all under water when he purchased it. He offered to prove that he paid a higher price for said land than it was worth for agriculture. He stated that he would not have purchased it at all except for its use as a reservoir (R. 90-91).

In 1920, five years before the Treaty of 1925, **Mr. Barney Arneson** purchased 160 acres nearly all under contour 1064, and paid a higher price for it because of its use for reservoir purposes (R. 64); offers of proof to the same effect were made by **Mr. Linus Landby** (R. 58) and **Mr. H. Robberstad** (R. 71, 72).

Petitioner Brewster acquired his land in 1922, and paid a higher price for it because of its use as a reservoir (R. 94).

Petitioner Olson filed on his homestead May 8, 1923. He would not have filed on this tract except for the fact that a part of it possessed higher value for storage purposes (R. 97). Fifty-six acres of said homestead was under contour 1064 (R. 98).

In 1921, four years before the Treaty of 1925, **Petitioner Karlson** purchased 160 acres practically all under water (R. 99). He purchased the same be-

cause of its use and value for power purposes (R. 100).

Clearly the Treaty of 1925 could have no effect on prices paid for lands many years before the enactment thereof.

Furthermore, the final arugments before the International Joint Commission (Respondents' Ex. 32), which were published and circulated in the Lake of the Woods area, demonstrate the inaccuracy of the majority opinion that "it was not until the Convention of 1925 that there was any possibility of the land owner receiving any compensation for this taking of his land."

The following excerpts are typical:

Mr. Isaac Campbell, K. C., representing the power interests of the City of Winnipeg, said:

> "I think we ought to pay a fair share, our full share and that there is no objection to its being computed fairly, and liberally, not put at the exact market value of 10 per cent, but **at 20 or 25 per cent, that could be with safety added to what would be the estimated market value.** And, more than that, that value should, as soon as your report is acted upon, be paid, then; that is, be paid now, without waiting until the time comes when we will need to raise the water. . . . I think we should pay the full amount of the compensation that should be charged against us, pay it now. . . ." (R. 116.)

Mr. Campbell made that statement in 1916, nine years before the Treaty of 1925 was enacted. The American property owners have not yet been paid one penny for the use or taking of their land.

Mr. D. H. Laird, representing the Winnipeg Electric Railway Co. and the Winnipeg River Power Co., in his argument before the International Joint Commission, stated:

> "As power users, **we desire that higher level** and, as indicated by Mr. Campbell and Mr. Rockwood, the power users consider that **adequate and full compensation should be made to the landowners for the land necessarily taken for that higher level**; but the method of levying that compensation upon the power users, of course, is a purely domestic matter. If the power users in Canada get the benefit of it, I have no doubt that the Canadian authorities would see that they would pay it ultimately." (R. 117.)

Hon. C. J. Rockwood, of Minnesota, counsel for Minnesota & Ontario Power Company, filed a brief with the International Joint Commission which was published and circulated among the property owners and others interested in the storage reservoir, which brief was offered in evidence as Respondents' Exhibit 33. Mr. Rockwood said:

> **"Using the smaller figure, 115,000 horsepower, as the result of regulation, and the low estimate of $10.00 per annum as the value of a**

horse power, the result is $1,150,000.00 per annum, or interest at 5% on $23,000,000.00.

* * * * *

"A water power property consists not only in the riparian ownership of land suitable for the construction of a dam. Equally necessary are other property rights, such as flowage rights.

* * * * *

"The land necessary for this is part of the water power property. The site for storage reservoir, although remote, is equally a part of the water power property. . . .

"In the case of the Winnipeg River, the remotest and smallest reservoir site in the hills of northeastern Minnesota, or across the line in Ontario, is as necessary to the full development of the water power property whose wheels are to be turned at Du Bonnet Falls, as is the location for the dam and power house itself . . . .

". . . To hesitate in the expenditure of a few hundred thousand dollars, for the cost of flowage rights and protective works, would be nothing less than crime against succeeding generations." (R. 119-121.)

Publicity of such authoritative character could not do otherwise than increase the market price of

these lands. This publicity and the consequent **increase in market value occurred in 1916** even before anyone knew what would be the recommendation of the International Joint Commission and **nine years before the Treaty of 1925.**

Mr. Adolph F. Meyer, Chief Consulting Engineer for the American Section of the International Joint Commission, probably the best informed man in either country on the power interests and resources in the Lake of the Woods region, and Consulting Engineer for the Keewatin Power Company which built the Norman Dam that controls the lake levels, offered to prove that he was familiar with the conflict between the two groups of power interests competing for control of the reservoir, and that he was acquainted with the requirements of said two groups. That the difference in the requirements of said two groups was substantial and fundamental, and was of such a character as would, in the ordinary course of business, cause the Ontario group to compete with the Manitoba group for the right to develop and control the reservoir. That, because of the great value of the storage rights, and the conflict of interest between said two groups, the one or the other of said groups would have acquired the flowage easement if the Government had not undertaken to do so; and that it would have been entirely practicable for either of said groups to have acquired the flowage rights through private negotiation and purchase (R. 37-40).

Gardner S. Williams and **George C. Newton,** both hydraulic engineers of recognized ability and

experience, offered to testify to the same effect (R. 45-51, 54), that it was entirely practicable for private interests to acquire said flowage easement, and that private interests would have acquired the same if the Government had not done so.

Mr. George C. Newton (R. 75), experienced in the development of hydro-electric projects in international waters, offered to prove that the fact that the lake is international water would not retard development by private enterprise; that an illustrative case in point is the development by the St. John River Power Co. in the St. John River, which forms a part of the international boundary between the State of Maine and the Province of New Brunswick. The similarity between the St. John River development and the Lake of the Woods reservoir is shown by Respondents' Exhibit 1, material portions of which are contained in the record (R. 108-115).

Mr. Newton offered to prove that he had experience in acquiring flowage rights in the State of Michigan, where the right of eminent domain was only recently granted to hydro-electric companies; that he has acquired, by private negotiation without eminent domain, extensive flowage rights in the State of Michigan, and that in his judgment it would be entirely practicable for private interests to have acquired the flowage rights on the Lake of the Woods shorelands without aid of condemnation (R. 76-80).

These facts stand undisputed in the record. Therefore, the majority assumption that "it was not until the Convention of 1925 that there was any possibility of the landowner receiving any compensation for this taking of his land," and that there has not "been before or since any possibility of any other demand for such use," is entirely unfounded. The judgments based on such erroneous assumptions should be reversed.

The majority decision is based on this further assumption or conclusion:

> **"Justice to the landowner and to the public would demand that this flowage use be excluded from estimation of sales value of the lands unless it can be seen that such use was properly an element of such value, irrespective of these actualities. In other words, if such use was properly an element of such value before this trespass then it continued to be such in spite thereof and should be taken into account—otherwise not."** (R. 427.)

It is not easy to be certain just what is meant by the above quoted language. The effect of the majority decision is to exclude **actual use** from consideration in determining **market value**, but the reason for excluding it is not so clear.

In order to understand the majority reasoning we must know what is meant by the word **"properly,"** and by the phrase **"irrespective of these actualities."**

To what "actualities" does the majority refer? It would appear that by "actualities" is meant the assumptions of fact referred to above, namely, that the actual use was of no value to the property owner; that it was "not until the Convention of 1925 that there was any possibility of the landowner receiving any compensation for this taking of his land," and that there has not "been before or since any possibility of any other demand for such use."

But the record completely disproves these assumptions; therefore, they cannot be regarded as "actualities."

It is equally difficult to be certain what is meant by the phrase "properly an element of such value." The majority opinion assumes that **actual use** was not "**properly** an element" of market value; but no reason is advanced why actual use **which, in fact, increased the prices paid for similar lands** should not be "properly an element" of market value. The majority opinion simply assumes, without proof or demonstration, that actual use is not "properly an element" of market value, and then concludes that because it was not "properly an element of such value" it may not be taken into consideration in determining market value.

With due respect, it would appear that the majority opinion begs the question. It assumes the answer to the very question at issue, and then reasons in a circle from its unwarranted assumption. The

very question for determination is whether actual use is "properly an element" of market value. Obviously, that question may not be answered by the process of reasoning enployed in the majority opinion.

We believe that any fact or circumstance is **"properly an element" of market value, provided such fact or circumstance** has actually affected market value.

The true situation was expressed by Judge Booth as follows:

> ". . . the landowners offered to prove that other lands similar to those involved had been purchased long prior to the present condemnation proceedings because of their use for storage and reservoir purposes, and that larger prices were paid for such lands for that reason; . . . (R. 436.)
>
> ". . . nor is it material whether or not **there should have been logically** no element of value in the lands based upon adaptability and use for reservoir purposes until the titles were unified." (R. 437.)

The dissenting opinion clearly points out the error of the majority of the Court. Equally unsound, we believe, is the majority conclusion that:

> "if such use was properly an element of such value **before this trespass** then it continued to be

such in spite thereof, and should be taken into account—**otherwise not.**" (R. mid. 427.)

In determining whether any piece of property has any value for a special use, the first inquiry is whether the property is **physically adapted** to such use. The next inquiry is whether such use is likely **soon to be required or employed.** Physical adaptability creates value when employed to render service.

The actual use of Petitioners' lands by the Canadian power interests answered both of these questions. As early as 1912 everyone knew that these lands were physically adapted for the use they then served. Everyone knew that actual use would continue. The power interests had invested millions on that assumption (R. 117, 28, 34-40). This was a circumstance which would naturally increase market prices. **The record proves that market prices were increased.**

The error underlying the majority opinion is still further shown in its conclusion that:

> "If such use was properly an element of such value before this trespass then it . . . should be taken into account—otherwise not." (R. mid. 427.)

The majority conclusion requires that use must be considered and values determined as of a time "before this trespass." The trespass began in 1898 when the Norman Dam was built. The jury was re-

quired to determine market values at the time of condemnation in 1929. The majority reasoning eliminates from consideration the use of these lands during the period between 1898 and 1929. No reason has been suggested for eliminating the period of **actual use.** It is improper to do so.

It might very well be that "before this trespass" in 1898 the extent and the certainty of this hydro-electric development could not be foreseen, and that accordingly it might not then have affected market values; but certainly, after millions had been invested, and the reservoir had been used for 15 years, as was the case in 1916, when the power companies' representatives made their arguments before the International Joint Commission, there could be no doubt in the mind of anyone that the use being made of these shore lands was extremely valuable, and that such use would continue permanently. There was every reason why the actual use which was made of these lands in 1916 should affect market values, while in 1898 "before this trespass" the use which was then being made of them might have had no effect whatever upon market values.

It is difficult to follow the majority conclusion that the value of this ACTUAL USE "before this trespass" in 1898 may be considered by the jury in determining market value in 1929, but that the value of the ACTUAL USE in 1929 must be disregarded.

Enough has been said to point out the errors in the assumptions of fact, and in the reasoning under-

lying the majority decision. They arise from the basic error in excluding from consideration the **actual use** which had actually increased market prices. The judgments embodying the original error should be reversed.

2. Examination of Statement of Law

As a reason for excluding from consideration the actual use which was made of Petitioners' lands, the Circuit Court of Appeals assumed that:

> "for more than thirty years, these lands had borne the burden of this trespass to their detriment without hope of redress . . . It was a peculiar and unfortunate situation where the landowner was helpless." (R. 426-427.)

The majority decision excluding **actual use** from consideration, is based very largely on the assumption that Petitioners had no redress against the unlawful use of their lands. Is this assumption valid?

(A) TREATY OF 1909 GAVE PETITIONERS REDRESS

Article II of the Treaty of 1909 entered into between the United States and Great Britain in respect of Canada, provides:

> "but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary,

> shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; but this provision shall not apply to cases already existing, or to cases expressly covered by special agreement between the parties thereto." (Appendix A.)

Although the majority opinion does not mention the foregoing Article of the Treaty, the decision of the Court excluding **actual use** from consideration requires a holding by the Court that Article II of the Treaty of 1909 gave Petitioners no rights against "interference with" the waters on the Canadian side of the boundary.

The Treaty of 1909 is not limited to the Lake of the Woods. It is a Treaty of general application, and applies to all boundary waters between the United States and Canada. The Treaty should not be construed so as to limit unduly the rights of American property owners.

If it were not for the last provision in Article II that "this provision shall not apply to cases already existing. . . ." probably no one would question that the Treaty conferred upon Petitioners rights to be redressed on account of the wrongful use of their land.

What is meant by the phrase **"cases already existing"**? In view of the fact that the Proclamation accompanying the Treaty recites that some of the purposes of the Treaty are:

> "to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, and interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions **as may hereafter arise,"** (Appendix A.)

we believe that it is reasonable to construe the words **"cases already existing"** as applying to occasions or periods when there was "interference with" the boundary waters **"resulting in injury on the other side of the boundary."** It is only such occasional interferences that "shall give rise to the same rights and entitle the injured parties to . . . legal remedies."

It is significant that from 1898 to 1909 inclusive, there were five separate periods of time when the lake level was below 1059 sea level datum (R. 213, Gov't. Ex. 25). The ordinary high water mark to which the Government had a right to maintain the lake level was 1059 (R. 128-129). Accordingly there were no trespasses during these five separate periods of low water. Hence there were no "cases existing" for those periods.

The construction and maintenance of the Norman Dam was not a trespass. It gave rise to no cause for damage. But during the period from 1898 to 1909 inclusive, there were a number of periods of high water which caused damage. Each period of high water gave a separate cause for damage. Each

period of high water prior to the Treaty of 1909 presented a "case already existing." Article II of the Treaty expressly provides that these "cases already existing" should not be affected by the treaty. It was the evident intention of the High Contracting Parties that the Treaty of 1909 should not "apply to cases already existing" and growing out of the periodic flooding of American lands. In other words the Treaty of 1909 was not intended to affect past claims. It was intended to establish future "rights" and obligations.

It is significant that the word "cases" was used in the Treaty, rather than conditions, or diversions, or interference, or some similar term. It is fair to infer that if a condition such as created by the Norman Dam on the Lake of the Woods were intended to be excluded from the future application of the treaty, it would have been easy to express it in appropriate and unambiguous language.

It will be observed that Judge Booth makes no reference to the exception contained in Article II as to "cases already existing", but in his dissenting opinion he appears to be of the opinion that the Treaty of 1909 gave Petitioners a right of redress (R. 431-432.) This fact, together with the fact that Judge Booth uses the word "trespasses" in the plural (R. 430-431) might tend to indicate that he was of the opinion that there were a number of "trespasses" before the Treaty of 1909 was enacted, and that those were the "trespasses" referred to in Article II of the Treaty as the "cases already existing."

In this connection Articles IV and VIII of the Treaty of 1909 should be taken into consideration (Appendix A).

We believe that the Treaty of 1909, when taken as a whole, indicates a clear intention by the High Contracting Parties that any claims which might arise in the future for injuries caused by interference with boundary waters on either side of the boundary shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such interference occurred.

In would appear that cordial relationships between the United States and Canada would be promoted by giving the Courts of each country jurisdiction over claims arising in the other country because of interference with boundary waters. We believe that such was the plain intention of the Treaty of 1909, and that it is for the best interests of both countries that the Treaty be so construed.

(B) PETITIONERS HAD REDRESS UNDER GENERAL LAW

The dissenting opinion of Circuit Judge Booth deals with Petitioners' right of redress under general law, as follows:

> "Nor was the situation of the landowner as to recovery of such flowage use value as damages from the trespassers one of mere hopeless speculation. **Were this the case, it would be a reproach**

to both Governments concerned. On the contrary, it is, in my opinion, a reasonable and safe conclusion that once the facts were established, the landowner could get compensation in damages in the Courts of Canada, if the trespass had been committed by private parties; and probably could obtain compensation by Petition of Right, if the flowage use had been taken by authority of the Canadian Government (See Halsbury's Laws of England, Vol. 1, p. 17, paragraphs 21, 22, 23 and 24; and Vol. 10, pp. 26-30; also Vol. 2, D. L. R. (1928), p. 625, annotation 'Petition of Right' by Arthur S. Bourinot); and certainly he could obtain redress through diplomatic action between the two Governments.

"Such substantially, was the situation, in my judgment, when the present condemnation proceedings were brought." (R. 433.)

WHERE REAL ESTATE SITUATED IN ONE JURISDICTION IS INJURED THROUGH AN ACT COMMITTED IN ANOTHER JURISDICTION THE OWNER MAY ELECT WHETHER HE WILL SUE IN THE JURISDICTION WHERE THE LAND LIES, OR THAT IN WHICH THE ACT CAUSING THE INJURY WAS COMMITTED.

7 R. C. L. § 99, p. 1062

Note 42 A. L. R. 196, 210

15 C. J. Page 744, § 44.

The general proposition above stated is an exception to the general rule that an action brought for trespass to real estate must be brought within the jurisdiction of the court wherein the real estate in question is situated.

Rickey Land & Cattle Co. v. Miller & Lux
(C. C. A. 9th Cir.)
152 Fed. 11, 16

"The general doctrine of the common law is that an action for injury to real property, as trespass, or case for nuisance, is local, and must be commenced within the county or district in which the land lies. This seems to be controlled, however, by the rule above referred to, that, where an act has been committed in one jurisdiction which causes injury to realty in another, a suit may be brought in either."

Accord,

Stillman v. White Rock Mfg. Co.
23 Fed. Cases No. 13466
3 Woodf. & M. 539

Rundle v. Delaware & R. Canal
21 Fed. Cases No. 12139
1 Wall. Jr. 276

Foot v. Edwards
9 Fed. Cases No. 4908
3 Blatchf. 310

Mannville Co. v. City of Worchester
138 Mass. 89
52 Am. Rep. 261

Thayer v. Brooks
17 Ohio 489
49 Am. Dec. 474, and note

Smith v. Southern Ry. Co.
136 Ky. 162
123 S. W. 678
26 L. R. A. (N. S.) 927, and note

Armendiaz v. Stillman
54 Tex. 623

The American cases appear to be in accord with the common law of England on this proposition.

Bulwer's Case
4 Coke (part 7) 49
77 Eng. Reprint 411

Scott v. Brest
2 T. R. (Eng.) 238

In **Bulwer's case, supra, the Court said:**

"In all cases where the action is founded upon two things done in several counties, and both are material or traversable, and the one without the other doth not maintain the action there the plaintiff may choose to bring his action in which of the counties he will . . ."

"If a man doth not repair a well in Essex, which he ought to repair, whereby my land in Middlesex is drowned, I may bring my action in Essex, for there is the default, as it is adjudged in 7 H. 4, 8; or I may bring it in Middlesex, for there I have the damage, as it is proved by 11 R. 2."

We believe that it is well established on the authorities that Petitioners had a right under general law to be redressed for the use and flooding of their land.

(1) If the flooding was caused by the Keewatin Power Company, acting under authority of the Canadian Government, and if such action was not a tort, Petition of Right would lie against the Canadian Government for compensation for such use.

Attorney General v. De Keysers Royal Hotel, Ltd.
(1920) A. C. 508, 122 L. T. 691

36 T. L. R. 600, 64 Sol. Jo. 513, H. L.
Yates v. The King
20 Ex. C. R. 175

See also authorities cited by Judge Booth, (R. 433).

(2 If the flooding was caused under circumstances specified in (1) except that the use was tortious, Keewatin Power Company would be liable in trespass.

9 Halsbury's Laws of England, 2nd Ed. p. 691, note (a)

Feathers v. The Queen
6 B. & S. 257, 35 L. J. Q. B. 200, 12 L. T. 114, 122 E. R. 1191.

Tobin v. The Queen
16 C. B. N. S. 310, 33 L. J. C. P. 199, 10 L. T. 762, 143 E. R. 1148

Attorney General v. De Keysers Royal Hotel, Ltd., supra.

(3) If the flooding was caused by Keewatin Power Company, acting without governmental authority, the company would be liable in trespass. See authorities cited pages 48, 49, 50, supra.

From the foregoing examination of the facts and of the law, it appears that the assumptions underlying the majority decision, excluding actual use from consideration, are unfounded, and that accordingly the decision should be reversed.

(B) POTENTIAL USE—SPECIAL ADAPTABILITY FOR

1. Comparison of Facts assumed in the Majority Opinion with Facts Established in the Record.

The majority opinion excluding adaptability for potential use from consideration is based upon the

following assumed conclusions, which we believe are unfounded:

> "To assemble all of this flowage affected land would require acquisition of the rights of this great number of persons (including two Nations, one State, two Provinces, Indian tribes and private persons) in this large number of separately and variously owned tracts. We cannot think that such an eventuality held that degree of probability or possibility which would affect the value of these lands and be an influence or consideration affecting, in the slightest degree, the minds of sellers and buyers thereof in arriving at a fair price therefor. **Such use is too remote and speculative to have such effect in fact** and, therefore, can have none in law.
>
> ". . . **Before that Convention, such a tract of land would be worth only its usage for agricultural or fishing purposes** with the burden of the flowage actually there and the most which could be vaguely hoped for would be the removal of the flowage and the resultant use, for the above purposes, of the overflowed land. With the Convention came the certainty of compensation for the overflowed land. To the extent of this compensation, the value of the lands would be increased to the owner and, therefore, would be a factor in sales price thereof. **Beyond this, there is no vestige of reason for an increase.** Even if owners and buyers might actually have thought that this compensation would include an

> enhancement from use for flowage purposes, there was no justification in law for such view. **Such thought could spring only from the Convention** which had in mind this very improvement and values arising because of the particular improvement cannot be included in compensation." (R. ft. 427, 428.)

In our discussion under Point (A), ACTUAL USE, we pointed out in some detail the portions of the record which completely disprove the foregoing assumptions of fact. Accordingly, we will only enumerate them here.

1. The majority conclusion that

> "such use is too remote and speculative to have such effect in fact (to increase market price) (R. 428).

is absolutely disproved by offered evidence that **in fact market prices were actually increased**; and the court's statement that

> "we cannot think that such an eventuality held that degree of probability or possibility which could affect the value of these lands and be an influence . . . affecting . . . the minds of sellers and buyers thereof in arriving at a fair price therefor"

is not only disproved by the evidence but is immaterial, for, as pointed out in the dissenting opinion,

> "nor is it material whether or not there **should have been logically** no element of value in the lands based upon adaptability and use for reser-

voir purposes until the titles were unified." (R. 437.)

2. As pointed out, the majority assumption that "before the Convention such a tract of land would be worth only its usage for agricultural or fishing purposes"

is disproved by the record, and is unsound in reason, because **by far the largest areas of these shore lands were not used for "agricultural or fishing purposes." They were used exclusively for water storage purposes, and were actually bought and sold for a higher price on that account. It was upon their use for storage that their market value was based.**

3. By the same facts and reasoning, the court's conclusion that beyond the promise held out to Petitioners by the Treaty of 1925 "there is no vestage of reason for an increase" in market values, is entirely erroneous, and disproved by the record.

4. Furthermore, the assumption that

"even if owners and buyers might actually have thought that this compensation would include an enhancement from use for flowage purposes, there is no justification in law for such view,"

begs the very question to be proved. Whether there was "no justification in law for such view" is the question now before this Court for determination. A statement of the desired answer may not serve as the

major premise in a process of reasoning to prove the accuracy of the conclusion.

But the Court's conclusion is erroneous for still another reason, because, as we have pointed out, the fact that Petitioners could have obtained a higher price for their lands on the market, during a period of more than ten years before the condemnation, would be of value to them, regardless of whether such market price was justified, or not. **The law does not require that there be a legal or economic justification for the market. The law is satisfied with ascertaining what the market value actually was.** If the law were otherwise, the recovery of damage for breach of contracts for the sale and delivery of securities and property during the past five years would be attended with much difficulty and uncertainty.

5. Likewise the majority conclusion that any thought or expectation of an increase in price "could spring only from the Convention" (of 1925) is squarely disproved by the record, which proves, without contradiction, that as early as 1916, even before the report of the International Joint Commission was filed, these lands were actually bought and sold for higher prices because of their adaptability and use for storage purposes. The majority opinion is clearly in error when it concludes that the higher prices which were paid for these lands, ten years before the Convention of 1925,

> "could spring only from the Convention which had in mind this very improvement."

2. Examination of Conclusions of Law contained in the majority opinion compared with legal principles applied in other cases to similar facts.

The decision of the Circuit Court of Appeals is based on the following statement, in the majority opinion, regarding the law:

> ". . . Also, and particularly pertinent to our case, where **the use depends upon assembly of numerous tracts** separately owned **the probability of uniting or acquiring all of them** necessary to the use is an important—maybe a controlling —consideration in determining **whether the use is 'too remote and speculative to have any legitimate effect upon the valuation' (McGovern v. N. Y., 229 U. S. 363, 372** and see **United States v. Chandler-Dunbar Company, 229 U. S. 53, 80)**, and 'in estimating that probability the power of effecting the change by eminent domain must be left out' **(McGovern v. N. Y., 229 U. S. 363, 372, and see United States v. Chandler-Dunbar Co., 229 U. S. 53, 80-81)**. The things we deem material to bear in mind in the foregoing statement of the law are that existing uses influence values; that potential uses are not considered if they are remote and speculative; **that they are remote and speculative if the use depends upon the union of numerous tracts,** variously owned, **and such union is improbable** and that **in determining such probability the power of eminent domain must be excluded."** (R. 426).

It will be helpful in analyzing the foregoing statement to inquire:

1. Whether the principles stated, when compared with the facts in the record, would support the court's judgment.

2. Whether the statements contained in the majority opinion conform with the law as enunciated by this court.

In applying the principles to the facts in the record the following conclusions would appear proper:

(a) As to these shore lands, it is **not a fact** that **"the use depends upon assembly of numerous tracts."** Their use has been an accomplished fact for thirty years. As stated in the dissenting opinion:

> "unification of titles may have been somewhat impracticable, but co-operation between the various owners including the United States and Canada (even by acquiescence) as to maintenance of lake levels was not impossible, but an established fact . . ." (R. 437).

(b) **"The probability of uniting or acquiring all of them,"** that is, all of the tracts and titles, was practically a certainty. Physical unification was an accomplished fact. The lands were valueless except for storage. They have been flooded for thirty years. The owners held them for sale for storage purposes. The majority opinion states that the owners had no right of redress on account of the trespass, that they

were "helpless." If such were the fact, the court which so found could hardly hold, as a matter of law, that, without eminent domain, acquisition and unification of the properties would be impossible. Especially could it not be so held in view of Petitioners' offers to prove by the witnesses **Meyer, Williams and Newton** that unification by private enterprise would be entirely practicable, and would have been accomplished except for the action taken by the Government.

(c) **"Whether the use is too remote and speculative to have any legal effect upon the value"** cannot be in question on this record. It is proved without contradiction in the record, that **the market value of these and similar lands was in fact increased.** It would appear that, **where it is proved that a certain fact or condition has been instrumental in sustaining a higher market for lands throughout a period of fifteen years, the legitimacy of its effect should no longer be open to question on an inquiry into the fact as to what the market value actually was.**

Even assuming the principles stated in the majority opinion to be the law, their application to the undisputed facts in the record would require a reversal of the judgments.

But we believe that the majority opinion does not accurately state or apply the law as laid down by this Court.

In a few words, the majority opinion states its theory and understanding of the law on which it af-

firmed the judgment of the District Court. The statement is:

> ". . . That potential uses are not considered if they are remote and speculative; that they are remote and speculative if the use depends upon the union of numerous tracts, variously owned, and such union is improbable and **that in determining such probability the power of eminent domain must be excluded.**" (R. 426).

Petitioners agree that potential uses should not be considered if they are remote and speculative and if they cannot be used without the unification of numerous tracts of land which is improbable. But that formula does not justify the exclusion of Petitioners' evidence in these cases for two reasons:

1. Because the union of Petitioners' lands is not improbable; it is an accomplished fact; and

2. Because the use is "actual" and not merely "potential."

But the question now under discussion is the accuracy of the statement of law upon which the majority decision rests:

> "That in determining such probability (the probability of uniting numerous tracts) the power of eminent domain must be excluded."

That is, the majority decision holds in effect, that **if it is impossible to unify variously owned tracts**

of land without the exercise of eminent domain, the peculiar adaptability of the land for a special use must be disregarded in determining its market value.

Petitioners conceive this statement of the law to be without support either in reason or in legal authority.

What reason could there be for such a rule?

If A owned a piece of land peculiarly adapted to grow celery, and acknowledged to be worth $500.00 per acre for that purpose, but was worth only $100.00 per acre for general agriculture, and if B owned all the adjoining land and desired to build a mill and a mill pond which would flood both tracts, what price must B pay for A's land? If A sells voluntarily will his compensation be the same as if he refuses to sell and B is required to exercise eminent domain? If A refuses to sell, unification becomes impossible except by eminent domain. Obviously the number of ownerships does not determine the difficulty of unification, nor does it determine the necessity of exercising eminent domain. It might be easier to acquire one thousand tracts from owners willing to sell than to acquire one tract from A who is not willing. It may be possible to acquire the one thousand tracts without eminent domain while it may be impossible to acquire A's tract except by the exercise of it. However, the necessity of exercising eminent domain is largely a matter of price. Usually any property can be acquired for a price. As a practical matter, emi-

nent domain is a protection against excessive prices.

Would anyone claim that A should be paid one price if he conveys without condemnation, but that he should be paid a smaller price if his land is taken from him by eminent domain? What reason can there be for permitting eminent domain to destroy market value, or to prohibit the owner whose land is condemned from proving the adaptability of his land for useful purposes, and the market value of it resulting from such adaptability? Yet this is the inevitable result of the rule announced in the majority opinion.

Application of that rule has deprived Petitioners of the right to prove the adaptability and use of their lands for reservoir purposes, although its market value was based entirely upon such adaptability and use.

Application of the rule stated in the majority opinion required the jury to consider only the adaptability and use of Petitioners' lands for agriculture, when it was undisputed that said lands had no adaptability for that purpose. Application of that rule required the jury to disregard the adaptability and actual use of Petitioners' lands for reservoir purposes, when it was admitted that the lands were adapted for no other purpose, and had never served any other use.

Something must be wrong with a rule which produces a result so unreasonable and unjust.

The answer is that whether unification of titles is accomplished by eminent domain or by voluntary conveyance has no bearing on whether special adaptability and use may be considered in determining market value.

The inquiry is as to market value, not as to means of unification. The question is, what was the land worth independently of the plan and activity of the taker? **The market value, excluding the activity of the taker, must be paid. No value contributed by the plan or activity of the taker may be added, and it matters not whether acquisition is by voluntary conveyance or by eminent domain.** Any increase in the market value caused by the taker must be excluded, but any market value which the land possessed by virtue of its location or other inherent qualities entirely independent of the taker, must be paid. **Every fact or circumstance which is independent of the taker must be considered if it actually has affected market value, or is such as would be likely to do so.**

We believe that the basic principle here stated does justice between the parties, and that it is logically and economically unassailable. It has been applied frequently in the decisions of this court. A case which clearly illustrates the principle and applies it is

New York v. Sage
239 U. S. 57.

In that case the Commissioners found the value of the real estate to be $7,624.45, and allowed the

further sum of $4,324.45 "for reservoir availability and adaptability." There was no finding of any increase in the market value of the real estate because of said "reservoir availability and adaptability." This court disallowed the sum which the Commissioners added over and above the fair market value. Mr. Justice Holmes, speaking for this Court, said (pp. 60-62):

> "Upon an inspection of the record it appears to us, as the language of the commissioners on its face suggests, that their report does not mean that the claimant's land had a market value of $11,948.90 — that it would have brought that sum at a fair sale—but that they considered the value of the reservoir as a whole and allowed what they thought a fair proportion of the increase, over and above the market value of the lot, to the owner of the land, subject to the opinion of the court upon the point of law thus raised. Upon that point we are of opinion that they were wrong.
>
> * * * It is said that in this case there was testimony that the lot was worth more than the total allowed. But the only explanation of the separation of items by the commissioners is that they were not prepared to say that the market value of the lot was $11,948.90, seeing that the claimant bought it a few days before for $4,500, but that they thought the **additional value gained by the city's act** should be taken into account and shared between the city and the owner

of the land—a proposition to which we cannot assent."

The majority opinion cites and relies upon

McGovern v. New York
229 U. S. 363

in support of its judgments.

The controlling question in the **McGovern case** was whether the proceedings in the Courts of New York constituted "due process of law." This Court did not approve or disapprove the findings of the Commissioners. It merely held that plaintiff in error had not been denied "due process of law." We find nothing in the **McGovern case,** when considered in connection with its peculiar facts, which in any way justifies the exclusion of Petitioners' evidence from consideration in the instant cases. Here Petitioners' lands possess inherent adaptability for reservoir purposes. Such inherent adaptability was in actual use at the time of condemnation, and had been so used for thirty years, and an actual increase in the market value of the lands had resulted therefrom. **The market value could not be determined without considering the inherent adaptability and actual use of the lands.** There is a taking of Petitioners' lands with their inherent adaptability and their consequent market value. In the **McGovern case** this court said that Petitioners would be entitled to recover the **market value of what was taken from them.** The court said (p. 372):

> "The plaintiff in error was entitled to be paid only for **what was taken from him as the titles stood,** and **could not add to the value** by the hypothetical possibility of a change unless that possibility was considerable enough to be a practical consideration and actually to influence prices. **Boston Chamber of Commerce v. Boston, 217 U. S. 189, 195.** In estimating that probability the power of effecting the change by eminent domain must be left out."

It is this last quoted sentence upon which the majority opinion mainly rests.

It should be kept in mind that, in the instant cases, all that Petitioners sought to prove and to have considered by the jury, was **"what was taken from them as the title stood"** before these proceedings were commenced. The **McGovern case** recognizes their right so to recover.

All that the **McGovern case** excludes is the attempt to **"add to the value** (which the lands possessed **as the title stood**) by the hypothetical possibility of a change." The majority decision excludes evidence of facts and circumstances which, in fact, increased market values "as the titles stood," and for a continuous period of more than 10 years before any attempt was made to unify the titles.

There is no showing in the record that the Government's proceedings to effect a change in these

titles has in any way increased market value. Indeed, it is doubtful whether any such showing could be made, for the lands possessed the same inherent adaptability, and served identically the same use, **"as the title stood,"** as they will possess and serve after the Government acquires the easement. **It is the adaptability and use of these lands for reservoir purposes,** and **not the condition of the titles, which gave them their market value. Notwithstanding the condition of the titles, these lands had a market value based upon their special use and adaptability. This, Petitioners had a right to prove. That right was denied.**

The evidence which was excluded, and which the jury was instructed to disregard, did not tend to **"add to the value by the hypothetical possibility of a change,"** but it did tend to prove the market value of **"what was taken from them as the title stood,"** and for this, the **McGovern case** holds that "plaintiff in error . . . was entitled to be paid."

The facts were substantially the same in the **Sage** and the **McGovern** cases. Our understanding of the law as applied by this court to the facts in those cases is justified by the statement of the court in

C. G. Blake Co. v. U. S.
275 Fed. 861
Aff'd. 279 Fed. 71

which case was later cited with approval by this court in

U. S. v. New River Collieries Co.

262 U. S. 341.

The Court in the **C. G. Blake case** construed the holding in the **Sage case,** as follows (p. 866):

> "The question under consideration was whether the commissioners, in fixing compensation for property appropriated by the city for reservoir purposes, were justified in **adding to the sum allowed for the land and building** a further amount 'for reservoir availability and adaptability.' **No question as to the general condition of the real estate market was before the court.** The court found that the commissioners had considered the value of the reservoir as a whole and allowed a fair proportion of the increase **over and above the market value of the lot.** It was held that adaptability for the purposes for which the land could most profitably be used might be considered, but only so far as the public would have considered it if the land had been offered for sale in the absence of the city's exercise of the power of eminent domain. * * * The fair market conditions there referred to seem to have been **those conditions of availability of the land itself** and the title thereto which would have affected its sale to one of the public, as distinguished from **those conditions supplied by the city by the very exercise of the right of eminent domain."**

A similar construction of the **McGovern case** was made by the Supreme Court of Maryland in

Brack v. Mayor, etc. of Baltimore
125 Maryland 378
93 Atl. 994
Ann. Cas. 1916 E. 880

where the Court said (pp. 996-997):

"An examination of the decisions rendered in that case by the Courts of New York and by the Supreme Court of the United States, has satisfied us that they are not opposed to the general trend of authority on the subject under inquiry . . . In that case **the landowner did not attempt to prove that the value of the property had been increased by its availability for reservoir purposes before the commencement of the condemnation proceedings.** It was pointed out that there was no evidence 'of any circumstance by which the value of the parcel in question, as a part of a natural reservoir site, could be estimated or determined.' In the absence of such evidence, it was held that the owner had received the benefit of everything which enhanced the value of his property **except the increase caused by its appropriation for the use of the city.** . . . It is apparent, therefore, that the case last cited is consistent with the theory of the other decisions referred to that **any particular capability which actually enhances the value of the property, independently of the demand created by the condemnation, should be considered**

in the estimate to be made of the market value which constitutes the measure of compensation."

The controlling principles are pointed out in a discussion of an early New York Case,

In Re Gilroy
85 Hun. 424
32 N. Y. S. 891

contained in a later New York case, involving lands and circumstances similar to those contained in the **McGovern** and the **Sage** cases.

In Re Board of Water Supply of City of New York
58 Misc. 581
109 N. Y. S. 1036, 1049

This case had to do with the condemnation of lands in the Ashokan reservoir for the city of New York. The commissioners excluded evidence tending to prove the value of the Ashokan reservoir to the city of New York. The Supreme Court of New York affirmed the action of the Commissioners, and, in distinguishing **In re Gilroy,** pointed out clearly the distinction, running through all the cases, between **values inherent in the land** and **values contributed by the exercise of eminent domain.** The Supreme Court of New York said:

"In order to understand this case (In Re Gilroy) it is necessary and essential to understand the facts that were before the court. The land sought to be condemned by the City of New York

was a portion of Lake Gilead, in Putnam County . . . From that time (1841) on down until the commencement of the proceedings to acquire the remainder of Lake Gilead in 1891, for half a century, the City of New York had constructed the large Croton Dam, which forms the Croton Lake, on the Croton River, about ten miles downstream from Lake Gilead, and from time to time the city had purchased and leased various lakes and ponds, and constructed dams and reservoirs thereon, . . . so that some fifty years thereafter, when this proceeding came to be started, **it became fairly well known that lakes and ponds of fresh water were desirable property to hold in that section above the Croton Reservoir, as it was likely to be desired by the City of New York, and a good profit realized thereon, and a market value for such property was created.** The City of New York had also used for some time the water of this Lake Gilead so that at the times these proceedings were commenced, before and while they were pending, this desire on the part of New York City for an addition to its water supply, **it can easily be seen, had affected the market value of properties of that kind.** Reading the decision in the light of the questions before the Court, we **can see that what was shut out by these Commissioners was the market value of this property, a value which had grown up with the years, and which had increased by the parties holding this lake for this long term.** All the City of New York had to do, upon acquiring that

lake, was simply to raise the gates, and the water flowed in the natural stream down and into the large Croton Reservoir, so that the conditions there were entirely different from what the conditions are here."

The distinction pointed out in the above language of the Supreme Court of New York applies to and accurately describes the controlling characteristics descriptive of Petitioners' lands. **"What was shut out," by the trial court, "was the market value of this property, a value which had grown up with the years." A market value based entirely on the adaptability and use of these lands for reservoir purposes.**

In the **McGovern case,** Mr. Justice Holmes speaking for this court, cited with approval

Sargent v. Merrimac
196 Mass. 171
81 N. E. 970
11 L. R. A. (N. S.) 996

In the **Sargent case** Judge Loring, who wrote the opinion for the Supreme Judicial Court of Massachusetts, said (p. 971):

"The market value to which the petitioner was entitled was made up of the value of the land apart from its special adaptability for water supply purposes, **plus such sum as a purchaser would have added to that value because of the chances that the land in question might be some**

day used as a water supply. Moulton v. Newburyport Water Company, 137 Mass. 163."

It is significant that in the **Sargent case** the trial court instructed the jury as follows (p. 972):

> "I said that you could consider the evidence of the uses to which this property was adapted, all the uses. Upon that, in connection with those uses, you can take into account in the Sargent case the fact that there was or was not, as you find it to be from the evidence, a supply of water upon the premises. **If that would give an added value to the property in the mind of any purchaser in the open market and in the mind of any seller in the open market, you could take that into account; but you could not use it to mark up a price beyond the fair market value of the property. . . . If the fact that it was adapted to use as a water supply,** if you find that to be a fact, **would have affected the mind of anybody in dealing with the property, that you can take into account,** but that is the extent to which you can go, and you may think that that, practically, as the land was situated, did not affect its value at all. On the other hand, you may think that it added to or decreased its value."

A comparison of the trial court's instructions to the jury in Petitioners' cases with the trial court's instructions in the **Sargent case,** which case was cited with approval by this court in the **McGovern case,** will serve to point out the error in the instant cases.

District Judge Sanborn's instructions to the jury in the cases at bar were:

> "But you will not make an award based on any claim for reservoir value. I have held that under the law the value of these lands could not be based upon the use of the lake and its shores for reservoir purposes. It is, as I understand it, conceded that the only other use for which these lands are suited, with the exception perhaps of Mr. Olson's tract, is for agricultural purposes, or purposes relating to agriculture, so that it is for this purpose that you are to value these lands.
>
> . . .
>
> **"As you understand, at the outset of this case perhaps the most controverted question was the question as to whether in determining the value of these lands, any added value could be accredited them because of the fact that they formed the boundaries or shores of what would be a very large reservoir, which would be used in part for the benefit of power companies on the Winnipeg River. I have held that as a matter of law, that question does not come into this case under all of the circumstances, so that you have absolutely nothing to do with it, and will not consider it in any way in your deliberations."** (R. 130.)

The principles stated in the **Sage** and **McGovern cases** and contained in the instructions of the trial court in the **Sargent case** were applied and reaffirmed by this court in

U. S. v. Chandler-Dunbar Water Power Co.
229 U. S. 52

where this court overruled the exception taken by the Government to the exclusion of the availability for lock and canal purposes as an element of value of the land taken. In that connection this court cited with approval

Shoemaker v. United States
147 U. S. 282

and quoted a portion of the instruction given the Commissioners in that case, as follows (p. 78):

> "In the court below the commissioners were instructed to estimate each piece of land at its market value, and that, 'the market value of the land includes its value for any use to which it may be put, and all the uses to which it is adapted, and not merely the condition in which it is at the present time, and the use to which it is now applied by the owner; . . . **that if, by reason of its location, its surroundings, its natural advantages, its artificial improvement, or its intrinsic character, it is peculiarly adapted to some particular use—e. g., to the use of a public park—all the circumstances which make up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating the compensation.**' The court approved this instruction."

The trial court's instructions in the instant cases are in direct conflict with the instructions approved

by this court in **Shoemaker v. U. S., U. S. v. Chandler-Dunbar Co., McGovern v. N. Y.,** and in **Sargent v. Merrimac.**

In speaking of some of the cases above cited and relied on in the majority opinion, Judge Booth, in the dissenting opinion, said:

> "The cases of **United States v. Chandler-Dunbar Company, 229 U. S. 53; McGovern v. New York, 229 U. S. 363;** and **New York v. Sage, 239 U. S. 57,** relied upon by the appellee, lend support rather to the contentions of appellants in the cases at bar, when comparison is made between the facts disclosed in those cases and the facts disclosed in the cases at bar." (R. 438).

IV. CONCLUSION FROM ANALYSIS OF REASONS ADVANCED IN THE MAJORITY OPINION, FOR NOT APPLYING THE GENERAL RULE TO PETITIONERS' CASES.

From the foregoing analysis and examination of the decisions of this court, and the undisputed facts contained in the record, we believe that the following conclusions are fair:

A. Reasons advanced in the majority opinion, when compared with the undisputed facts in the record, are found to be contrary to the facts and entirely unsupported, because the record establishes, without contradiction, that the market value of Petitioners' lands was effected and increased on ac-

count of their special adaptability and actual use; that such increase in market value occurred before and entirely independently of the acts or plans of the Government in acquiring the flowage easement; that neither the use of said land nor the increase in market value was dependent upon or caused by the act or plan of the Government in unifying titles, but that both the use and the increase in market value occurred many years before the Government undertook, or even decided, to acquire the flowage easements. That there was potential competition and demand for the flowage rights, and that such flowage rights would have been acquired by one or the other of the groups of competing power companies if the Government had not undertaken to acquire them. **Especially, that Petitioners' evidence,** which was excluded and eliminated from the consideration of the jury, **did not tend to prove any added value contributed by the plan or activity of the Government,** but, on the contrary, **tended to prove the market value, existing not only at the time of condemnation,** but which existed for many years prior thereto, and which was based upon the inherent adaptability and actual use of Petitioners' lands for reservoir purposes. **What was excluded from consideration was the market value of Petitioners' lands.**

B. The reasons advanced in the majority opinion are contrary to the decisions of this court.

C. The reasons advanced in the majority opinion are inconsistent with each other, in that the

majority opinion justifies the **exclusion of actual use** by holding that such use was unlawful, and **that Petitioners had no rights of redress and were "helpless"** in the matter, while the majority next justifies the **exclusion of special adaptability** for potential use **by holding that the exercise of eminent domain is necessary to unify the titles,** and "where the use is possible only through the exercise of that power 'it must be left out' in estimating the probability of such a use as affecting sales value and compensation."

Both of these propositions cannot be true. Either the property owners were not "helpless" and did have some right of redress, or the exercise of eminent domain was not necessary to the unification of titles.

If the property owners were helpless, then unification could be accomplished at will, without exercise of eminent domain, and there would be no cause, according to the reasoning of the majority opinion, to exclude adaptability for potential use.

If the exercise of eminent domain was necessary, in unifying the titles, it must be because the property owners were not helpless, but had enforcible rights which could not be taken from them except by the exercise of eminent domain, in which case, according to the reasoning of the majority opinion, there would be no justification for excluding evidence of the actual use of their lands.

Either the reason advanced for excluding actual use of the lands from consideration, or the reason ad-

vanced for excluding adaptability for potential use, must be untrue. It is respectfully submitted that both reasons are without support, either in the record or in the decisions of this court.

The judgments, therefore, should be reversed.

V. ADAPTATION OF THE GENERAL RULE TO SPECIAL FACTS AND CIRCUMSTANCES INVOLVED IN MEASURING JUST COMPENSATION.

As was intimated by **Mr. Justice Holmes** in **New York v. Sage, supra,** the general rule, as stated broadly in the earlier cases, has required further refinement in its application to special facts and circumstances which have arisen in the later cases. Without attempting to cover all possible classifications, it may be stated that the following classes of cases not infrequently occur:

(A) CASES INVOLVING LAND, TAKEN FOR PUBLIC USE, WHICH HAS NO INHERENT ADAPTABILITY FOR THAT USE; AND

(B) CASES INVOLVING LAND, TAKEN FOR PUBLIC USE, WHICH DOES POSSESS INHERENT ADAPTABILITY FOR THAT PARTICULAR USE.

Obviously in Class (A) the question of including special adaptability in estimating just compensation is not involved, and need not be considered in our

present discussion. The distinction between Class (A) and Class (B), as above stated, is clearly pointed out and illustrated in

Simpson v. Shepard (Minnesota Rate cases)
230 U. S. 352, 451

where Chief Justice Hughes, in speaking for the court, said:

> "But supposing the railroad to be obliterated and the lands to be held by others, the owner of each parcel would be entitled to receive on its condemnation its **fair market value** for all its available uses and purposes, **U. S. v. Chandler-Dunbar Company, 229 U. S. 53.** If, in the case of any such owner, his property **had a peculiar value or special adaptation for railroad purposes, that would be an element to be considered. Mississippi & Rum River Boom Co. v. Patterson, 98 U. S. 403; Shoemaker v. United States, 147 U. S. 282. . . .**"

We are here concerned with cases arising in Class (B).

When lands are taken for a public purpose which possess special adaptability for that purpose, such special adaptability should, or should not, be considered, in determining just compensation, according to whether such special adaptability has actually influenced, or is likely to influence, market values. Any one of three situations may arise:

The inherent adaptability may be so far removed from probability of actual use that it has not affected, and is not likely to affect, market values; or, the inherent adaptability is so likely to be in demand for use, within a reasonably proximate time, that market value would naturally and probably be affected thereby; or, the inherent adaptability has been used, and is in actual use, at the time of condemnation, and the market value actually has been influenced thereby.

Reference to a few cases illustrative of these classifications may assist in demonstrating Petitioners' rights in the instant cases.

1. The condition described in the first classification, where the special adaptability was so far removed from the probability of actual use that it would not be likely to affect market value was involved in **McGovern v. New York**, and **New York v. Sage, supra,** where this court held that the special adaptability of the lands in question was so far removed from practical use, except by the City of New York, that its effect upon market value must "be regarded as too remote and speculative to have any legitimate effect upon the valuation."

In the **Sage case,** however, this court expressly recognized that a different rule would apply if the possibility of use were such as would naturally affect market prices. The court said (p. 61 of 239 U. S.):

> "The fact that the most profitable use could be made only in connection with other land is

not conclusive against its being taken into account, if the union of properties necessary (to create the reservoir) (parenthesis furnished by counsel) is so practicable that the possibility would affect the market price. . . . The city is not to be made to pay for any part **of what it added to the land** by thus **uniting it** with other lots if that union would not have been practicable or have been attempted except by the intervention of eminent domain."

2. The condition described in the second classification, where the inherent adaptability is so likely to be in demand for use, within a reasonably proximate time, that market value would naturally and probably be affected, was involved in

U. S. v. Chandler-Dunbar
229 U. S. 53

wherein this court overruled Government's exception to an award of $25,000.00 as compensation for land possessing special adaptability for lock and canal purposes. This court, speaking through Mr. Justice Lurton, said (pp. 76-77):

"The exception taken to the inclusion as an element of value of the availability of these parcels of land for lock and canal purposes must be overruled. That this land had a prospective value for the purpose of constructing a canal and lock, parallel with those in use, **had passed beyond the region of the purely conjectural or speculative.** That one or more additional parallel canals and

locks would be needed to meet the increasing demands of lake traffic **was an immediate probability. This land was the only land available for the purpose.** It included all the land between the canals in use and the bank of the river. Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, **it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose."** (Citing cases.)

The significance of the difference in the facts pointed out between the two classifications was made clear in the language quoted supra from **Simpson v. Shepard.** In the **Simpson case** it was indicated that a railroad right-of-way across an area devoted exclusively to agriculture would revert to the same type of land as surrounded it, and would be available only for agriculture, but, as stated in the opinion, if "any property had a peculiar value or special adaptation for railroad purposes" "that would be an element to be considered."

A case illustrating this point is

Joint Highway District No. 9 v. Ocean Shore Railroad Company,
128 Cal. App. 743
18 Pac. (2d) 413

Defendant owned a strip of land which served as a gateway through a mountain range, through which defendant had partly developed a railroad

right-of-way. Defendant then experienced financial difficulties, and the project was abandoned and finally dismantled. Plaintiff claimed that the land through this gateway had no value except as "bare land located where it was too steep to even raise goats." Defendant claimed that the land had a market value for a special use as a railroad right-of-way. The value for this special use was allowed by the California Court. At page 417 of 18 Pacific (2nd), the court said:

> "We believe it perfectly clear that certain land may be of but small value in use for one purpose and of much greater value in use for another purpose. It may therefore be said to have a different value for one purpose than for another if the word value be understood as meaning its value in use. But a given piece of land has only one market value and not a certain market value for one purpose and a different market value for another purpose. . . .
>
> ". . . This market value may be greater or less than the value in use to either the owner or the condemnor, but in the eyes of the law it is a fixed amount determined by 'the highest sum which the property is worth to persons generally, purchasing in the open market in consideration of the land's adaptability for any proven use.'
>
> ". . . Appellant seems to consider that there can be no market value unless there is an active demand, but such a rule would frequently result in depriving the owner of his property with-

out awarding him just compensation. **The mere fact that there is no one who is ready, willing, and able to purchase the property at the time in question does not mean that the property has no market value. . . . We believe that opinions on market value may be given by qualified experts based entirely upon a potential demand where the evidence tends to show a reasonable probability that purchasers for the property may be found within a reasonable time.** In passing we may state that a 'reasonable time' in cases like the present one is far greater than in cases involving ordinary land."

Another case involving facts illustrative of the second classification is

Ford Hydro-Electric Company v. Neely
13 Fed. (2d) 361
(Certiorari denied 273 U. S. 723)

where the Circuit Court of Appeals, Seventh Circuit, said (p. 362):

"The objection made to the question asked, and now urged to the testimony given by both witnesses, goes to the competency of the evidence sought and brought out; that is, to the competency of evidence as to the peculiar fitness of the land for particular purposes as an element in estimating its value. That this is proper evidence to be considered by the jury in determining the market value of the land has been often decided. . . . The evidence objected to

threw light upon the availability of the land for water power purposes and the value of such element, as bearing upon what might be paid for it by one desiring to purchase it, and thus bore upon its market value. By objecting to this evidence, plaintiff in error sought to exclude it altogether. As remarked by the trial judge, the objection went rather to the weight to be given the evidence than to its competency. **The availability of the land for the development of water power, and the value of it for such purposes, was a proper element to be considered by the jury in fixing its market value. . . .**

"The point made in the objection to the question and in the assignments of error, and pressed upon the argument here, that the witness Newton and Williams 'considered the lands as a part of a united whole, the whole consisting of all the parcels of land necessary to a completed water power development which would include the lands taken' does not impress us. The argument appears to be that, where the lands sought to be condemned are not the whole of the lands needed, but only a part thereof, the elements called by the trial judge 'raw water power value of land' and by the Supreme Court in Boom Co. v. Patterson, supra, 'its capability of being made available' for such purpose, cannot be considered at all in determining value. From the arguments of plaintiff in error we conclude that its real grievance is that the jury gave too much consideration to the element of potential

water power. **This being an element proper to be considered, it could not be excluded,** but plaintiff in error could have asked the court to instruct the jury that they should take into consideration the probability or practicability of so uniting all the lands as to make the water power appertaining to the lands of defendants in error available. The authorities cited by plaintiff in error recognize the propriety of such evidence."

Accord

Monongahela Navigation Co. v. U. S.
148 U. S. 312

U. S. v. Chandler-Dunbar Co.
229 U. S. 53, at 76

Sanitary District of Chicago v. P. Ft. W. & C. Ry. Co.
216 Ill. 575, at 583
75 N. E. 248.

3. A case involving the taking of property specially adapted to a particular use and already devoted to that use is

Monongahela Navigation Co. v. U. S.
148 U. S. 312.

That case involved the taking of certain locks and dams built and used for navigation purposes. In discussing whether the use value of these locks and dams should be considered in determining just compensation, Mr. Justice Brewer, writing the opinion for this court, said (p. 337):

"Whatever be the true value of that which it takes from the individual owner must be paid to him, before it can be said that just compensation for the property has been made. And that which is true in respect to a condemnation of property for a post office is equally true when condemnation is sought for the purpose of improving a natural highway. .... If a man's house must be taken, that must be paid for; and, if the property is held and improved under a franchise from the State, with power to take tolls, that franchise must be paid for, because it is a substantial element in the value of the property taken."

Southern Ry. Co. v. City of Memphis
126 Tenn. 267, 148 S. W. 663
41 L. R. A. (N. S.) 828
Ann. Cas. 1913 E. 153

Condemnation of Railroad property for a city park. (Page 669 of 148 S. W.):

"It (just compensation) includes every element of usefulness and advantage in the property. If it be useful for agricultural or for residence purposes, **if it has adaptability for a reservoir site** or for the operation of machinery, if it contains a quarry of stone or a mine of precious metals, if it possesses advantage of location or availability for any useful purpose whatever, **all these belong to the owner, and are to be considered in estimating its value.** It matters not

that the owner uses the property for the least valuable of all the ends to which it is adapted, or that he puts it to no profitable use at all. **All its capabilities are his,** and must be taken into the estimate."

The same principle is similarly applied in

Sanitary District of Chicago v. P. Ft. W. & C. Ry. Co.
216 Ill. 575
75 N. E. 248

In this case the court said (pp. 251-252):

"The property taken constituted part of the freight and passenger terminal of the railways of the defendants in the city of Chicago. * * * **The witnesses for the petitioner stated that they took into account the use to which the property was put and its adaptability to such purpose, and that it had a market value, which they stated.** But it is perfectly clear from their testimony that none of them had any definite idea of the value of the property to the owner in connection with the use to which it was put. Their estimates of value per square foot were on the basis of ordinary real estate sold in the market in that way. **The witnesses for the defendants did not know the market value, by the square foot or otherwise, of property in the city of Chicago, and had not dealt in real estate in that way; but they knew the value of the property as a freight terminal, and were fully qualified to give their**

opinions on that subject. The jury were called upon to determine the value of an integral portion of a freight terminal which was a part of extensive railway systems, and the damage to the residue, and it was property which had no market value. . . . **It is a matter of common knowledge that such property as this and devoted to such a use is not bought and sold in the market or subject to sale in that way, and that such property has no market value in a legal sense. The property being devoted to a special and particular use, the general market value of other property was not a criterion for ascertaining compensation, although it might throw some light on the actual value."**

VI. STATEMENT OF CONTROLLING PRINCIPLES DETERMINING CONSIDERATION OF SPECIAL ADAPTABILITY AND USE IN ESTIMATING JUST COMPENSATION.

An examination of the cases and of the controlling principles applied to facts similar to those now before the court points to the following generalization: Any inherent adaptability for a special use, possessed by land taken for public purposes, must be considered in determining just compensation, provided such inherent adaptability exists and is recognized independently of the plan or activity of the taker, and provided such special adaptability has actually affected the market value of the land, either because it is actually used for a special purpose, or

because its use for such purpose is so probable that it actually has affected market value, or would be likely to do so. The compensation awarded may include only the amount or extent to which the market value has been increased by such inherent adaptability for a special use, and may not include any amount which may have been added to the market value by the plan or activity of the taker. The well considered cases uniformly support this generalization. The following cases, in addition to those above referred to, are illustrative:

What is proper to consider in determining market value was clearly stated by Mr. Justice Butler in

Brooks-Scanlon Corp. v. U. S.
265 U. S. 106, 123, 125, 126.

"It is the sum which, considering all the circumstances—uncertainties of the war and the rest—probably could have been obtained for an assignment of the contract and claimant's rights thereunder; that is, the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy. . . .

". . . Determination of just compensation is to be based on the fact that claimant's contract and its rights and interests thereunder were expropriated, and that it is entitled to have their value at the time of the taking. The value of such ships at the time of requisition, and the then probable value at the time fixed for delivery, the contract price, the payments made and

to be made, the time to elapse before completion and delivery, the possibility that by reason of the Government's action in control of materials, etc., the contractor might not be able to complete the ship at the date fixed for performance, the loss of use of money to be sustained, the amount of other expenditures to be made between the time of requisition and delivery, together with other pertinent facts, are to be taken into account and given proper weight to determine the amount claimed lost by the taking (Citing Minnesota Rate cases, 230 U. S. 352, 451 and other cases) that is, the sum which would put it in as good a position pecuniarily as it would have been in if its property had not been taken."

Weiser Valley Land & Water Co. v. Ryan
(C. C. A. 9th Cir.)
190 Fed. 417, 423

"All the uses to which the property is available, the most advantageous as well as the less advantageous, should be taken into view, and the general estimate of the market value should be deduced; not what any one person would give for it for his particular use, but what could probably be obtained for it if a sale was desirable and a purchaser sought, applying the ordinary business methods of finding a purchaser and disposing of the property."

Niagara, Lockport & Ontario Power Co. v. Horton
231 App. Div. 402
247 N. Y. S. 761, 764-765.

Proceeding in condemnation to acquire property for water power purposes.

"The commissioners concluded that the witness had adopted an erroneous theory of damages and struck out, not only his answer that the land in question had a market value of $269,000, but all of his testimony. This was error. To be sure, if the defendants mean to claim that the value of defendants' land is conclusively 'determined' by the proportionate share which defendants' land contributes to a complete development built upon, and by that use of defendants' land combined with plaintiff's land, such claim is not supported by the authorities. * * *

"But defendants are entitled to the **fair market value of their land for its highest and best available use.** And this is true, even though that best available use be use in connection with other lands, whether owned by defendants or by plaintiff or by strangers to the parties. The defendants are not entitled to have for their land what it may be worth to the plaintiff, nor what it would damage plaintiff not to be able to obtain it. **They are entitled to what it is worth on the market for the best use to which it is adaptable.**

"And when a witness, duly qualified as an expert, to give evidence on the question of value, gave his opinion as to value, his evidence should not have been stricken out, but should have been considered for what it was worth, in view of all

that he said in regard to the method by which he arrived at his conclusion, and keeping in mind the true measure of damages."

Gearhart v. Clear Spring Water Co.
202 Pa. St. 292
51 Atl. 891

Proceedings to condemn land for a reservoir. The tract was part of a natural basin.
(pp. 891-892.)

"The attempt on the part of the defendant at the trial was to limit the proofs to the value of farm land in the vicinity, on the theory that this piece of land had no other value, as the defendant owned or had obtained options on the land which surrounded it, without which this piece could not be used in the building of a reservoir. . . . **Here was a new use which created a market for land, with which its value for cultivation had nothing to do. The location alone fixed the value.** Whether the land was available for the use testified to was a question of fact, and the **argument directed to the court against the admission of the testimony should have had great weight with the jury in determining the value."**

Cited with approval in

Wadsworth v. Mfctrs.' Water Co.
256 Pa. St. 106
100 Atl. 577

Edwards v. City of Cheyenne
19 Wyo. 110,
114 P. 677, 689

"The fact that the city required the land for the purposes of erecting a dam thereon would not affect the question. **Is the land so situated and the demand for dam and reservoir sites** for power and irrigating purposes in the particular locality **so great or probable as to enhance the market value?"**

Accord

U. S. v. Boston, C. C. & N. Y. Canal Co.
(C. C. A. 1st Cir.)
271 F. 877, 893

Union Electric Light & Power Co. v. Snyder Estate Co.
65 Fed. (2d) 297

Emmons v. Utilities Power Co.
82 N. H. 181
141 Atl. 65

San Diego Land & T. Co. v. Neale
8 Calif. 50
25 Pac. 977

Alloway v. Nashville
88 Tenn. 510
13 S. W. 123

City of Stockton v. Vote
76 Calif. App. 369
244 Pac. 609

Cochrane v. Commonwealth
175 Mass. 299, 302

"When an injury is done to property which is not commonly bought and sold, and a case arises in which the amount of that injury must be ascertained, it is proper to allow testimony to be given of its value **for the special purposes for which it is used,** and to allow that testimony to be given by persons who show themselves qualified to testify thereto from knowledge derived from experience in their own business in which they have dealt with similar property. . . .

". . . **To exclude such evidence would be to deny to the owner the power of proving the real value of that property;** no one can testify to that value by knowledge derived from the sale of lands in the neighborhood; they are not similar lands; nor by sale of mill sites for such purposes, for mill sites are not commonly bought and sold. **Evidence of the value of the property as a mill site for such purposes, given by persons who have knowledge thereof derived from experience in that business, must be admitted from the necessity of the case."**

THE ENGLISH AND CANADIAN LAW ALLOWING CONSIDERATION OF SPECIAL ADAPTABILITY ACCORDS WITH THE DECISION OF THIS COURT.

Cedar Rapids Mfg. & Power Co. v. LaCoste
(1914) App. Cas. 569
30 T. L. R. 293

Appeal from the Superior Court of Quebec, House of Lords and Privy Counsel, L. L. Dunedin, Atkinson & Shaw.

Expropriation of two islands and other property in the St. Lawrence River. The commissioners had allowed only agricultural value. The Superior Court of Quebec set aside the commissioners' award and allowed the value of the islands to the taker.

The Privy Council held that the proper measure of damage was the market value of the islands in view of their adaptability for a special use.

Lord Dunedin, for the Privy Council, said:

"The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England. . . .

"Where, therefore, the element of value over and above the **bare value of the ground itself** (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking, . . . the value is not a proportional

part of the assumed value of the whole undertaking, but is merely the price, **enhanced above the bare value of the ground,** which possible intended undertakers would give. . . .

* * * * *

"Now, with regard to the Ile Aux Vaches and the reserved water rights, it seems possible that there may be some value **over and above the bare value.** If the situation be naturally favorable to the establishment of power works like those of the appellants, then it is possible that the respondents and others might have been prepared to offer an enhanced value on this account, taking the chances of a situation in which they might or might not obtain the necessary parliamentary powers to work out a commercial scheme. But the value emerging through a grant of such powers having been actually given can not, after the event, be taken into account."

In re Arbitration between
Lucas and Chesterfield Gas & Water Board
1 L. R. K. B. D. (1909) 16, 21-22

Condemnation of land for a storage reservoir. Counsel for the Water Board argued:

"The circumstances of the case are such as to prevent any special adaptability of the claimant's land for the purpose of the construction of a reservoir forming an element in the value of the land upon an assessment of compensation. . . .

there is no reasonable possibility of the owner of the land being able to avail himself of its suitability for the purpose. . . . Under the circumstances no one could be a competitor with the Water Board for the acquisition of this land for the purposes of a reservoir; the Board is the only possible purchaser for that purpose."

Buckley, L. J., in reading the judgment of the Court said (pp. 35-37):

"The frank cynicism of the argument which the appellants have the courage to address to the Court has occasioned me surprise. I hope I do not go too far when I say that the argument can only be seriously advanced by a speaker who studiously shuts his eyes to the immorality of its substructure. . . . They contend that where one of the three is in fact desirous of using the land for that special purpose, and has in fact obtained from the legislature compulsory powers to enable him to do so, he can deprive the other two of the special value arising from the adaptability, and that upon the ground that the special purpose cannot be effectuated without his consent. They say that they went to the legislature and obtained compulsory powers for a special public purpose, and that in fixing the fair value to be paid for the exercise of their compulsory powers they are entitled to say that the special purpose cannot be carried out, because they do not assent to the land being used for that purpose.

* * * * *

"The facts here are that not only is there a reasonable possibility of the site coming into the market, but that the site is wanted for the particular purpose, and is being acquired under compulsory powers for that purpose. **The land is so situated in proximity to the reservoirs already existing that within a reasonable time it will be reasonably certain that it will be required for this special purpose, with the result that it has acquired an enhanced value. That was a matter for the umpire to take into consideration.** To effectuate that purpose the Board must necessarily concur so far as they are owners of part of the site. In this state of things there is nothing to exclude the element of adaptability."

Accord

In re Arbitration between the Mayor of Tynemouth and Duke of Northumberland.
The Law Reporter, L. T. R. 89 N. S. Sept. 1903 to Feb. 1904, page 557.

VII. MULTIPLICITY OF OWNERSHIPS, INTERNATIONAL RELATIONSHIPS, AND DIFFICULTY OF UNIFICATION, AND OTHER FACTS WHICH MIGHT DETRACT FROM MARKET VALUE, DO NOT EXCLUDE ADAPTABILITY AND USE FROM CONSID-

ERATION. ALL FACTS, FAVORABLE AND UNFAVORABLE, SHOULD BE CONSIDERED.

The decisions of this Court have repeatedly emphasized that the ultimate question for determination here is, what was the market value. The factors and relationships which effect market value are material only insofar as consideration of them may assist in determining what the market value actually was. Courts, wisely, have declined the impossible task of determining what the market value logically or legitimately should have been at any given time. They have inquired only what was the market value, in view of all the facts and circumstances which in any way affected it.

That the lands border on international water does not change the ultimate question nor alter the method of consideration by which the question may be answered. **(U. S. v. Chandles-Dunbar Co., supra; Cedar Rapids Mfg. & Power Co. v. LaCoste, 30 T. L. R. 293, supra.)** Even the uncertainties of war do not alter the method of determining just compensation, but must be taken into consideration. **(Brooks-Scanlon Corp v. U. S., supra).**

Adverse factors, such as multiplicity of titles, international relationships, difficulty of unifying titles, and similar considerations, emphasized in the majority opinion, doubtless tend to depress market values, but there is no justification for holding that

these adverse considerations make it improper to consider the favorable factors which, in spite of all the adverse factors, have actually increased the market value.

It being conceded that the ultimate question is, what was the market value, and it being proved, without contradiction, that the market value of these lands used for storage was higher than the market value of similar lands for agriculture, why is it proper to consider the deterent and depressing factors, such as difficulty of unification, if it is improper, as the majority decision holds, to consider the favorable factors, such as actual use and inherent adaptability, which admittedly have increased market values? No reason has been suggested for giving controlling significance to the one group of facts and circumstances and competely disregarding the other.

We have pointed out above that the unification of titles is unimportant in determining the question here under consideration, because of the prior use which had been made of the lands, and the fact that all landowners were anxious to sell their property for the legitimate completion of the storage reservoir, and also because there was an admitted increase in the market value of the lands, notwithstanding the fact that legal titles were not yet unified.

There is the further consideration that all the lands necessary for the storage reservoir had been devoted to that use, and had already been unified

in fact through the prior use for reservoir purposes. Where physical unification is an accomplished fact, so that the actual use of the land is made possible, and market values have been increased by such physical unification and use, the problem of unifying the legal titles is not controlling, and is in fact of but little significance. As stated by the Supreme Court of New Hampshire in

Emmons v. Utilities Power Company
82 N. H. 181
141 Atl. 65, 68, 69

"A new situation has been created by the taking. **The condemnor has eliminated all uncertainty of effecting the combination of the properties.** But the issue is still, what was the market value of the land in its undeveloped and separate state? The test is always the market value of the land when taken, and 'not the value which it might have under circumstances different from those then existing.' "

* * * * *

"The true rule seems to be that the enhanced market value, if any, of the plaintiff's land, due to its adaptability for valuable uses in conjunction with other properties, may be shown if the practicability of the combination of all the necessary properties upon which such availability depends was at the time of the condemnation so great as to have probably affected the public mind, and therefore to have enhanced the price which a purchaser might be expected to give."

The law, the logic, and the economics of the situation require that all factors, favorable as well as unfavorable, be considered insofar as they appear to have affected market values. Judge Booth stated the question and its answer briefly and clearly:

> "It seems to me that the question is one of fact whether the adaptability for reservoir or flowage purposes coupled with the long continued actual use for such purposes entered into the value of such lands or not. . . . The question whether the adaptability, coupled with the actual use, did in fact enter into the value of the lands was, in my opinion, for the jury, and the question should have been submitted under proper instructions." (R. 436-437).

VIII. IN AFFIRMING THE JUDGMENTS OF THE DISTRICT COURT, THE MAJORITY OF THE CIRCUIT COURT OF APPEALS ERRED, BECAUSE SAID JUDGMENTS DENIED PETITIONERS THE RIGHT TO PROVE AND TO HAVE THE JURY AWARD THE VALUE OF THE FLOWAGE EASEMENT ON THEIR LAND AS A SEPARATE UNIT OF PROPERTY.

Petitioners urge that the judgment of the Circuit Court of Appeals denying their right to prove and to recover the fair market value of the flowage easement, as a distinct unit of property, was error. In view of the fact that the Treaty of 1925, and the en-

abling legislation, provided for the acquisition of **a flowage easement,** just compensation is the fair market value of the flowage easement acquired.

It is recognized that the usual and orthodox method of assessing just compensation is to determine the value of the property immediately before and immediately after the taking, and compute the difference.

In the instant cases, however, the government is acquiring a flowage easement. Why not determine just compensation which must be paid therefor by ascertaining directly, what is the value of the property which is taken?

The orthodox method of assessing the difference in the value of the land before and after the taking, came into practice in the condemnation of rights-of-way for roads, and later for railroads, under circumstances which did not require the taking of the entire property affected. A right-of-way for a railroad or a road could usually run over any one of a number of different tracts of land, and seldom required the taking of the entire tract. Naturally the decrease in the value of the tract was the logical measure of just compensation in such a case.

But a different rule obtains where the entire unit of property is taken.

A owns a city lot or a ten acre tract, and the en-

tire tract is taken. What then is the measure of compensation?

A owns mineral rights on B's land, or owns an easement for travel over C's land, or owns an equity in a quantity of coal in his own coal yard. If the government takes A's mineral rights or his easement for travel, no one will question that just compensation would be the value of the property taken.

Likewise when the government during the war appropriated private property for public use, the value of the property on the market was the measure of just compensation, regardless of the intrinsic value of the property. When no fair or free market existed for the property which had been taken, the opinion of qualified experts as to the fair value of the property was accepted as the basis for computing just compensation.

C. G. Blake Co. v. U. S.
275 Fed. 861
aff'd 279 Fed. 71

National City Bank v. U. S.
275 Fed. 855

U. S. v. New River Collieries
262 U. S. 341

Why should we not assess just compensation for a flowage easement, in exactly the same way as compensation is determined wherever the entire unit of that particular property is taken?

Petitioners urge that the before-and-after measure of compensation does not properly or logically apply where the property taken is a separate unit or species of property, and is capable of being acquired and transferred independently of the land on which it may be located.

Cases may arise where both measures should be used, as where a part of a city lot is taken for an elevated railway, the remaining portion of the lot may be damaged by noise or dust. **In the instant case, however, appellants have expressly waived all claims for damage to their land not covered by the easement. The entire flowage right up to elevation 1064 sea level datum is taken. The question is, what is just compensation for it?**

Suppose Petitioner Olson had a 99 year lease on Petitioner Karlson's land, and that he had a building, or a lease-hold, admitted to be worth $10,000. If the Government acquired or destroyed Mr. Olson's building would any one attempt to determine the compensation due him for the loss of his building by trying to compute the market value of Mr. Karlson's fee before and after the taking?

Or suppose the Canadian power interests, thirty years ago, had organized an American subsidiary and had lawfully acquired and paid for a flowage easement on all American lands in the Lake of the Woods storage reservoir, and had continued to use said easement for storage and power purposes, just as they have done for thirty years; then suppose the

Government sought to acquire said flowage easement by condemnation, would anyone suggest that the compensation due the Canadian interests for their flowage easement held by their American subsidiary, would be limited to the before-and-after value of the bare naked fee title? Surely no one would deny that the owners of said flowage easement should be paid the fair value of their easement for the uses and purposes to which it was then, and for the past thirty years had been, devoted, and for which it was most adaptable and valuable.

Then suppose the Canadian power interests had acquired all flowage easements contained in the Lake of the Woods storage reservoir except the flowage right and easement belonging to Petitioner Olson. Would anyone urge that one measure of just compensation should be paid to the Canadian interests, while another measure should be paid to Petitioner Olson?

A similar situation was discussed and commented upon in **C. G. Blake Co. v. U. S., supra**, where the question was the compensation which should be paid for a quantity of coal that had been requisitioned by the Government. The Court said (p. 867):

> "Suppose this coal had been requisitioned not from the producers . . . but from those who had produced the same upon the open market. . . . would it be said that the measure of just compensation was the cost of production

plus a reasonable profit? Or, on the other hand, cost to the dealer from whom it was taken plus a reasonable profit? Assuming part were requisitioned from the producer and part from the retail dealer, would they be allowed different rates of compensation? Is the compensation to be determined by who receives it? Just compensation is for the property, not to the owner. Mr. Justice Brewer in **Monongahela Navigation Co. v. U. S., 148 U. S. 312."**

Yet, the court, in the instant case, excluded all evidence of the value of the flowage easement which the Government is seeking to acquire, and instructed the jury to estimate compensation on the adaptability and use of the lands for agriculture. No land used or adaptable for agriculture is taken. Then why talk about value for agriculture? A flowage easement is taken. Why not determine its value, and pay it?

Article 8 of the Treaty of 1925 between the United States and Canada provides that:

> **"A flowage easement** shall be permitted up to elevation 1064 sea level datum upon all lands bordering on Lake of the Woods in the United States, and the Untied States assumes all liability to the owners of such lands **for the cost of such easement."**

It will be observed therefore, that it is the **flowage easement** which is being acquired and paid for.

The Act of Congress which carried said treaty

into effect, authorizes and directs the Secretary of War:

> "to acquire . . . by purchase or by condemnation . . . **the flowage easements** up to elevation 1064 sea level datum upon all lands in such state (Minnesota) bordering on the Lake of the Woods . . ."

Likewise the Government's petition in these proceedings

> "prays for a judgment in these proceedings that it acquire the **perpetual easement**, right and privilege as against all the respondents . . . **to overflow** all that part of the lands hereinbefore described;" etc. (R. 5-6).

It is plain that we are concerned with the value of the **flowage easement.**

It is well settled that easements of all kinds are dealt with in the law as property, separate and distinct, just the same as any other item of property, and that when they are acquired by condemnation just compensation must be paid therefor.

20 Corpus Juris, Sec. 83, p. 593

20 Corpus Juris, Sec. 131, p. 655

2 Dunnell's Minn. Digest § 3037

Adams v. C. B. & N. Ry. Co.
39 Minn. 286, 290
39 N. W. 629

International Paper Co. v. U. S.
282 U. S. 399

Carondelet Canal Co. v. Louisiana
233 U. S. 362, 388

U. S. v. Cress
243 U. S. 316

It is well settled that flowage rights and storage reservoirs are listed and valued as property in determining the rates to be charged by public utility companies, and also for taxation purposes.

San Joaquin & C. Co. v. County of Stanislaus
233 U. S. 454

McCardle v. Indianapolis Water Co.
272 U. S. 400

Township of Beaverton v. Lord
235 Mich. 261
209 N. W. 122

It will be agreed that it is not only good law but that it is good business and sound economics to treat storage reservoirs and flowage easements as separate units of property. Taxing authorities are under the necessity of finding new sources of income, and it is now generally recognized that storage reservoirs and flowage easements may be taxed, and that likewise these same items of property may be, and are, carried on the books of public utility companies at high values, and are appraised in determining the rates which shall be charged for service.

In the instant case Petitioners offered to prove as a fact by competent witnesses, that flowage easements and flowage rights are sold and dealt in generally as separate units and items of property (R. 41-43, 80, 87) and that in the State of Minnesota conveyances of flowage easements are recorded under the recording act, and that they are assessed and taxed as property, both by the state and municipal taxing authorities (R. 41-43).

The record clearly establishes the following facts which are not disputed:

1. That the flowage easement being acquired is absolutely necessary to the formation and use of the Lake of the Woods storage reservoir (R. 36).

2. That said reservoir was formed for power purposes by the construction of the Norman Dam by the Keewatin Power Company more than thirty years ago, and that it has been in use for the development of hydro-electric power ever since (R. 22-23, 61-62, 71, 73-74).

3. That for all practical purposes the easement now acquired by the government will be used for identically the same purposes, and Petitioners' lands will be subjected to the same use and servitude as have obtained during the past thirty years, and that it is the property's most adaptable and valuable use (R. 22-23).

4. That the flowage now being acquired by the Government has been imposed on Petitioners' land, and on the shore land of the Lake of the Woods ever since 1898 substantially as it will be in the future under the treaty regulation (R. 22-23).

5. That this condemnation proceeding by the Government is not a part of a development that is to come up in the future, but that it is a proceeding to condemn a flowage imposed upon the land in question ever since 1898 (R. 22-23).

6. That the flowage easement being acquired covers all lands and all flowage rights included on the American portion of the Lake of the Woods storage reservoir, and therefore is a complete taking of Petitioners' entire flowage property up to elevation 1064, and no claim is made for damage to remaining property.

It would appear from the foregoing that the flowage easement which is being condemned is a complete, existing unit of property; that it has been in existence for more than thirty years; that it is now being condemned for identically the same use as it has served for a third of a century; that it will continue perpetually to be so used, and that the entire unit of property is being taken.

We believe that the law and logic of the situation dictate that under these facts just compensation is the fair value of the property taken, and not the con-

sequential damage sustained by the owners of the naked fee, and that accordingly Petitioners were entitled to have the court give their first request for instructions to the jury, as set forth in their Assignment of Error No. 129 (R. 405).

Whatever confusion there may appear to be in the language by some courts in dealing with the subject of just compensation in cases of this kind, is due, we believe, to failure to distinguish between cases where the entire unit of property is taken, and other cases where only a part of the property is taken. In the former class of cases it is urged that the value of the property taken is the proper measure of compensation.

It is a distinction between **compensation for property taken,** when it is all taken, and **damages to the remaining estate** when the property is not all taken. In the instant cases all of the flowage rights permitted by the Treaty, and all of the flowage property which can possibly belong to Petitioners according to the Treaties of 1909 and 1925, is being taken, and **Petitioners have expressly waived all claims for damage to their remaining property.**

It is stated in the majority opinion that the "unit rule" should not be applied to these cases because it does not appear that the entire right of flowage is taken. The fact is that the Treaty of 1909 provides that there shall be no interference with boundary waters except by authority of the International Joint Commission. That Commission, after full investiga-

tion, has recommended a flowage easement to elevation 1064; and that level has been fixed by the Treaty of 1925, and by Act of Congress. There can be no change in that level, or in the flowage easement without the approval of the International Joint Commission and the concurrence of Canada and the United States in a modification of the Treaty. No other flowage easement, therefore, can be possible, without the approval of the International Joint Commission, and concurrence of both Governments. We believe, therefore, that for all practical purposes it may be said that all of Petitioners' flowage rights and property are taken in these proceedings.

The majority opinion holds, on the authority of **Boston Chamber of Commerce v. Boston, 217 U. S. 189,** that Petitioners may not separate the flowage easement from the fee for the purpose of determining just compensation.

What was held in the **Boston Chamber of Commerce case** was that the Chamber of Commerce could not unite its interests with the interest of a mortgagee, and the interest of Central Wharf etc., Corporation, which held a perpetual easement for travel over the plot of ground owned by The Chamber of commerce, and, in that way, eliminate the easement from consideration and present an unincumbered title on which to claim compensation.

So far as the Chamber of Commerce was concerned there was a perpetual easement for travel outstanding against its plot of ground. That outstand-

ing easement was not extinguished by the arrangement entered into between the Chamber of Commerce and the owner of the easement. Obviously, a city lot, encumbered with a perpetual easement for travel, is not entitled to the same compensation for its taking as it would be if it were unencumbered and available for business purposes. The fact that the owner of the fee and the owner of the easement combined their interests could make no difference. The property taken was still a plot of ground encumbered with a perpetual easement for travel. **That easement for travel was not taken in the condemnation proceeding, for the plot of ground in question would still be available for travel after acquisition by the city.**

With Petitioners it is different. They own the entire unencumbered fee. If they shall be paid for the flowage easement, they will be paid only for what is theirs, and for what is taken from them. If payment were made to the Boston Chamber of Commerce for an unencumbered lot, the City of Boston would be paying for something which did not exist, which it did not take, and which the Chamber of Commerce did not own; but if payment were made to Petitioners, measured by the value of the flowage easement taken, the Government would be paying for exactly what it has taken, and Petitioners would be paid only for what was their own unencumbered property, which has been taken from them.

Because of the dissimilarity in the facts, we believe that the **Boston Chamber of Commerce case** is not a controlling authority against allowing Peti-

tioners to prove the fair market value of the flowage easement, and to have their just compensation measured thereby.

IX. IN AFFIRMING THE JUDGMENTS OF THE DISTRICT COURT, THE CIRCUIT COURT OF APPEALS ERRED BECAUSE SAID JUDGMENTS ARE CONTRARY TO THE SPIRIT OF THE TREATY OF 1925, AND THE ACT OF CONGRESS FOR CARRYING IT INTO EFFECT.

To avoid extending Petitioners' brief unduly, we submit this point without argument on the discussion of it by Judge Booth in his dissenting opinion (R. ft. 437, 438).

CONCLUSION

From the foregoing examination of the facts and the law it appears fair to conclude:

1. It was error to exclude evidence of the actual use served by Petitioners' lands, at and prior to the time of taking, because such use was the most valuable for which said lands are adapted, and formed the basis of their market value; also because the Treaty of 1925 and Acts of Congress clearly contemplate that such use and adaptability should be considered in estimating just compensation.

2. It was error to exclude evidence of the special adaptability of Petitioners' lands for reservoir purposes, because their adaptability and demand for

their continued use, together with the practicability of uniting the properties had all been assured by thirty years of actual use for storage, which gave the lands an increased market value entirely independent of any plan or act of the taker.

3. It was error to instruct the jury to disregard all evidence of the special adaptability and actual use of Petitioners' lands in determining their market value, because their market value was based entirely on their adaptability and use for reservoir purposes; and was admittedly higher than that of lands as well adapted for agriculture, but which were not adapted for storage.

4. It was error to instruct the jury to determine the market value of Petitioners' lands solely on their adaptability and use for agriculture, because they have never been used for agriculture, and they have no adaptability for that purpose. The jury was instructed to disregard the market value which existed in fact, and to assume a market value based upon a hypothesis which never was, and never will be, a fact.

5. It was error to hold that Petitioners had no rights of redress for the use which had been made of their shore lands, because the Treaty of 1909 gave them such rights, and because they possessed such rights under general law.

6. It was error to exclude evidence of the market value of the flowage easement, as a separate unit of property.

7. It was error to affirm the judgments of the District Court because said judgments took Petitioners' property without just compensation in violation of the Fifth Amendment to the Constitution of the United States, and of Article I, Section 13 of the Constitution of the State of Minnesota.

For these reasons the judgments of the Circuit Court of Appeals for the Eighth Circuit should be reversed, and new trials should be granted.

Respectfully submitted,
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The State of Minnesota having lands affected by the foregoing entitled proceedings, and being interested in the determination of the questions involved herein, has appeared by permission of the court at the trial of the cases in which the foregoing entitled appeals were taken, and joins with Petitioners in the foregoing brief

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APPENDIX A

PERTINENT PARTS OF THE TREATY OF 1909 BETWEEN THE UNITED STATES AND GREAT BRITAIN WITH RESPECT TO THE DOMINION OF CANADA. 36 STAT. PART II, PAGE 2448.

"The United States of America and His Majesty the King of the United Kingdom of Great Britain . . . being equally desirous to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise, have resolved to conclude a treaty in furtherance of these ends . . . ."

ARTICLE II.

"Each of the High Contracting Parties reserves to itself or to the several State Governments on the one side and the Dominion or Provincial Governments on the other as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters; but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary,

shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; but this provision shall not apply to cases already existing, or to cases expressly covered by special agreement between the parties hereto. * * * *"

ARTICLE III.

"It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the Parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission." * * *

ARTICLE IV.

"The High Contracting Parties agree that, except in cases provided for by special agreement between them, they will not permit the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the

effect of which is to raise the natural level of waters on the other side of the boundary unless the construction or maintenance thereof is approved by the aforesaid International Joint Commission." * * *

ARTICLE VIII.

"This International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles III and IV of this treaty the approval of this Commission is required. * * *

"In cases involving the elevation of the natural level of the waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters, or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby. * * *"

APPENDIX B

PERTINENT PARTS OF THE TREATY OF 1925 BETWEEN THE UNITED STATES AND GREAT BRITAIN WITH RESPECT TO THE DOMINION OF CANADA, 44 STAT. PART III, PAGE 2108.

"The United States of America and his Majesty

the King of the United Kingdom of Great Britain
* * *

"Desiring to regulate the level of Lake of the Woods in order to secure to the inhabitants of the United States and Canada the most advantageous use of the waters thereof and of the waters flowing into and from the Lake on each side of the boundary between the two countries, and

"Accepting as a basis of agreement the recommendations made by the International Joint Commission in its final report of May 18th, 1917, on the Reference concerning Lake of the Woods submitted to it by the Governments of the United States of America and Canada,

"Have resolved to conclude a Convention for that purpose. * * *"

ARTICLE VIII.

"A flowage easement shall be permitted up to elevation 1064 sea level datum upon all lands bordering on Lake of the Woods in the United States, and the United States assumes all liability to the owners of such lands for the costs of such easement. * * *"

ARTICLE IX.

"The United States and the Dominion of Canada shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom.

"Each shall likewise assume responsibility for any damage or injury which may hereafter result to it or to its inhabitants from the regulation of the level of Lake of the Woods in the manner provided for in the present Convention."

ARTICLE X.

"The Governments of the United States and Canada shall each be released from responsibility for any claims or expenses arising in the territory of the other in connection with the matters provided for in Articles VII, VIII, and IX.

"In consideration, however, of the undertakings of the United States as set forth in Article VIII, the Government of Canada shall pay to the Government of the United States the sum of two hundred and seventy-five thousand dollars ($275,000) in currency of the United States. Should this sum prove insufficient to cover the cost of such undertakings one-half of the excess of such cost over the said sum shall, if the expenditure be incurred within five years of the coming into force of the present Convention, be paid by the Government of Canada."

PERTINENT PARTS OF PROTOCOL ACCOMPANYING CONVENTION TO REGULATE THE LEVEL OF THE LAKE OF THE WOODS.

"2. Should it become necessary to set up a special tribunal to determine the cost of the acquisition of the flowage easement in the United States provided for in Article VIII of the Convention, the Government of Canada shall be afforded an opportunity

to be represented thereon. Should the cost be determined by means of the usual judicial procedure in the United States, the Government of Canada shall be given the privilege of representation by counsel in connection therewith."

APPENDIX C

PERTINENT PARTS OF THE ACT OF MAY 22, 1926, 44 STAT. PART II, PAGE 617, AS AMENDED BY ACT OF APRIL 18, 1928, 45 STAT. PART I, PAGE 431.

"That the Secretary of War be, and he is hereby, authorized and directed to acquire, as soon as practicable after the enactment of this act, by purchase or by condemnation, in accordance with the provisions of the Act entitled 'An Act to authorize condemnation of land for sites for public buildings, and for other purposes,' approved August 1, 1888, and in accordance with the constitutional provisions of the State of Minnesota which provide that private property shall not be taken, destroyed, or damaged for public use without just compensation therefor first paid or secured, the flowage easements up to elevation one thousand sixty-four sea-level datum upon all lands in such state bordering on the Lake of the Woods, Warroad River, and Rainy River, and such lands or interests therein as are necessary to provide for the protective works and measures in such state along the shores of the Lake of the Woods and the banks of the Warroad River and the Rainy River as specified in Article 8 of the Convention

signed at Washington on the 24th day of February, 1925, between the Governments of the United States and Great Britain, providing for the regulation of the level of the Lake of the Woods.

"In proceeding by condemnation for acquiring such flowage easements on any tract of land any benefit to the remainder of the tract or the property thereon derived from such easement shall be considered and damages shall be awarded accordingly.

"Sec. 2. * * * All moneys which may be paid by the Government of Canada to the Government of the United States under Article 10 of the Convention are hereby appropriated and made available for expenditure by the Secretary of War for the construction of such works, and the carrying out of such measures, and for the acquisition of easements, lands, and interests therein, as provided in Section 1 of this Act. * * *

"Sec. 3. The Secretary of War is hereby authorized and directed to cause to be investigated, as soon as practicable, all claims for damages caused, prior to the acquisition of flowage easements under this Act, to the inhabitants of the United States by fluctuation of the water levels of the Lake of the Woods due to artificial obstructions in the outlets of said lake, and after due notice and opportunity for hearing, shall ascertain and determine the loss or injury, if any, that may have been sustained by the respective claimants and to report to Congress for its consideration the amount or amounts he may find

to be equitably due such claimants, together with a statement in each case of the substantial facts upon which the conclusion is based. * * *"

APPENDIX D

ARTICLE I, SECTION 13, CONSTITUTION OF MINNESOTA

"Section 13. **Private Property for Public Use—** Private property shall not be taken, destroyed or damaged for public use, without just compensation therefor first paid or secured."